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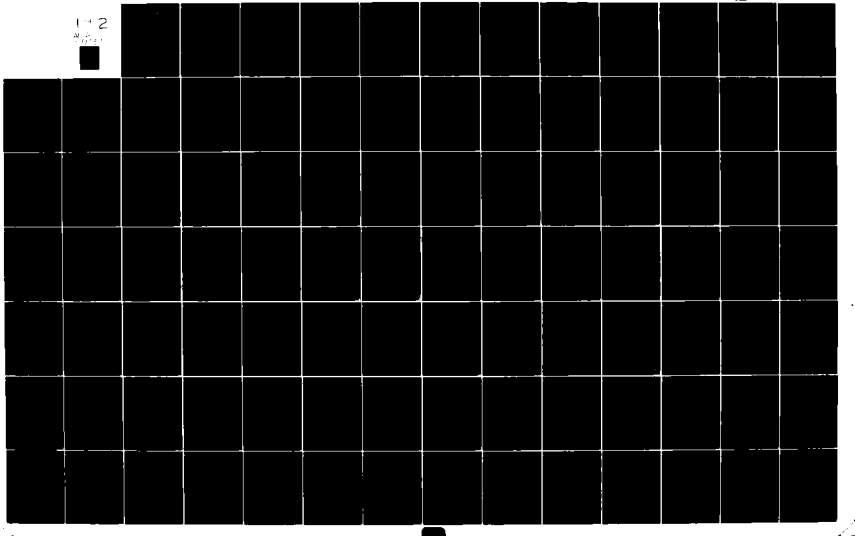

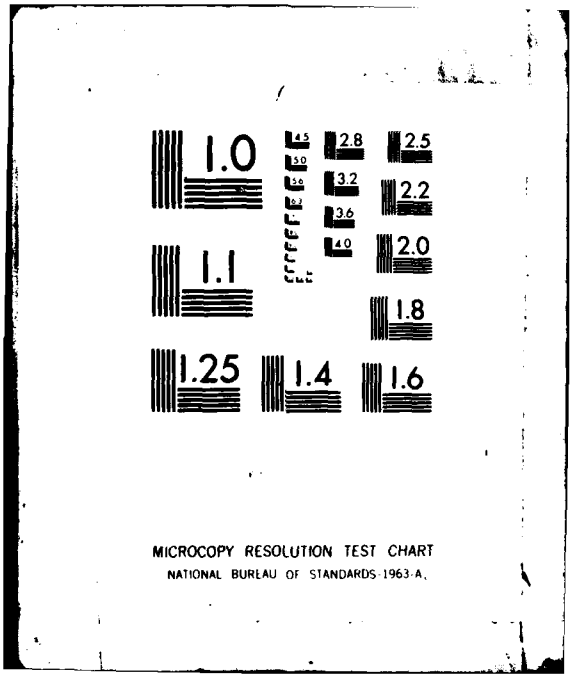
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REPORT DOCUMENTATION PAGE

READ INSTRUCTIONS BEFORE COMPLETING FORM

1. REPORT NUMBER	2. GOVT ACCESSION NO. AD-A110 737 / 3. RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) INTERNATIONAL CLAIMS TO ANTICIPATORY SELF DEFENSE: A JURIDICAL ANALYSIS	5. TYPE OF REPORT & PERIOD COVERED THESIS
	6. PERFORMING ORG. REPORT NUMBER
7. AUTHOR(s) HENRIKSEN, JOHN R.	8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS GEORGE WASHINGTON UNIV. WASHINGTON, DC	10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS CODE 031 NAVAL POSTGRADUATE SCHOOL MONTERY, CA 93940	12. REPORT DATE AUG 81
	13. NUMBER OF PAGES 165
14. MONITORING AGENCY NAME & ADDRESS(if different from Controlling Office)	15. SECURITY CLASS. (of this report) UNCLAS
	15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

APPROVED FOR PUBLIC RELEASE; DISTRIBUTION UNLIMITED

DTIC ELECTE FEB 0 9 1982 S E

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

INTERNATIONAL SELF DEFENSE
INTERNATIONAL ANTICIPATORY SELF DEFENSE

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

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INTERNATIONAL CLAIMS TO ANTICIPATORY SELF-DEFENSE: A JURIDICAL ANALYSIS

John R. Henriksen

July 25, 1981

INTERNATIONAL CLAIMS TO ANTICIPATORY SELF-DEFENSE A JURIDICAL ANALYSIS

John R. Henriksen

"If we agree that armed attack can properly achieve the purposes of the assailant, then I fear we will have turned back the clock of international order. We will, in effect, have countenanced the use of force as a means of settling international differences and through this gaining national advantages."

Dwight David Eisenhower
36 Dep't State Bull. 387, at 389
(Mar. 11, 1957)
(following the tripartite attack on
Egypt and Israel's initial refusal to withdraw)

I. INTRODUCTION

On December 24, 1979, the Soviet Union commenced massive troop movements into the neighboring state of Afghanistan. Besides invoking the obligatory explanation that the troops had been "invited" or "requested" by the true Afghan government, the Soviet Union further maintained that its actions were justified by the fact that it could "not allow Afghanistan's being turned into a bridgehead for preparation of imperialist aggression against the Soviet Union."[1] It is difficult to interpret this statement as anything but a claim to a right of self-defense extending beyond its borders into the territory of another sovereign state.

On June 7, 1981, the Israeli air force executed an aerial attack on the Osirak nuclear reactor site of the non-neighboring state of Iraq, after approaching through the airspace of Saudia Arabia (and perhaps Jordan). In announcing the completion of the attack, the Israeli prime minister, Menachem Begin, declared the attack to have been conducted as an act in "supreme, legitimate self-defense."[2]

These current invocations of a claim to an international right to exercise anticipatory self-defense outside one's own borders highlight the critical need for maintaining and reasserting objective criteria and analysis of international principles concerning self-defense, for as can be easily seen, one

state's security needs often contradict another state's rights to territorial integrity and political independence. Any expansion of the one contributes to the diminuition of the other.

The objectives of this paper are, therefore, twofold: (1) to investigate, both from a conventional and a customary-law standpoint, the current guidelines and groundrules which apply to any international claim of a right to anticipatory self-defense, and (2) to apply these internationally accepted standards to the Afghani and Osirak fact situations, in order to ascertain Soviet and Israeli compliance with, or defiance of, these standards. It is considered particularly important that the actions of both the Soviet Union and Israel are addressed in the following discussion, as their political ideologies are quite disparate, thus forcing the analysis, if it is to be consistent in each instance, to restrict itself to non-ideological, objective criteria, comporting with the touchstone principle of universality in the application of international law.[3]

II. Principles of International Law Concerning Anticipatory Self-Defense

A. GENERAL REFLECTIONS

It is almost unnecessary to say that self-defense is a fundamental cornerstone of both domestic and international legal systems. No matter how refined and pervasive a legal system may

be, it will always be inadequate to afford immediate protection to a would-be victim in an emergency situation. Punishment after the fact, although important, never compensates completely for the loss of life and limb which may have occurred in the interim.

This is especially true under the minimum world public order system currently extant under international law, which possesses a sanctioning process which frequently lacks the community will to bring to bear penalties commensurate with the delict that has been done. Too often the world chooses to tolerate the wrong-doer, whether for political, ideological or economic reasons, leaving the victim state occupied or annexed, dominated or dismembered. Without the vesting of a right to defend itself at the outset of the aggression, the victim state would be deprived not only of the ability to directly respond in self-preservation during the course of an attack, but also of the indirect ability to prevent the initiation of the aggression altogether, by maintaining in preparedness defensive measures which tend toward a balance of power, as a deterrent to expansionistic tendencies of other states. This principle of deterrence serves not only self-preservation, but due to its nature of being in advance of the aggression, the preservation of peace in general, thus being of benefit not only to the parties involved, but to the cause of international peace and security as a whole.

The pivotal nature of self-defense within the realities of our present world legal structure is clearly reflected in the

language of the United Nations Charter, where it is referred to as an "inherent" right of all states.[4] Tha basic parameters of this "inherent" right, however, were well established in the customary Law of Nations long before the drafters of the Charter included it in their world constitutional framework.

B. THE CUSTOMARY LAW OF SELF-DEFENSE

This "inherent" right of states to exercise self-defense has been clothed by customary law with clear principles of delimitation, in order to restrict its applicability to clearly defensive situations. Were a state to be allowed unbridled latitude in its application of the right to self-defense, each aggressor could justify its expansionist actions on its "defensive" needs, with any action or inaction of another state serving as a predicate for a "defensive" response of armed force.

In order to guard against such possible abuses, customary international law has imposed two basic requirements upon the exercise of the right of self-defense: (1) that the circumstances clearly support the necessity of taking some defensive action, and (2) that the action ultimately taken is not disproportionate to the injury reasonably anticipated or already incurred.[5] Beyond this, customary law ascribes the ultimate, after-the-fact determination of these two requisites of necessity and proportionality to the community of nations, that is, the initial judgement of the claimant must be held up to the light of public scrutiny, for without such external policing of the right of

self-defense, the claimant would become his own adjudicator, and the law of nations would lose all normative content.[6]

1. Necessity

In order to comply with the requirement of necessity, a resort to armed force as a defensive measure can only be justified if no effective peaceful alternative is available for a just resolution of the dispute, given the time constraints involved. Viewed administratively, the threatened state must exhaust all available peaceful remedies that might produce a just resolution; viewed chronologically, the immediacy of the threat will determine the viability, if any, and extent, of the required pursuit of such peaceful avenues of just settlement. The less imminent the threat, the more demanding the requirement of exhaustion of peaceful alternatives.[7]

During the course of the diplomatic correspondence which surrounded the Caroline dispute of 1837, Daniel Webster, then United States Secretary of State, formulated the following oft-quoted definition of the requisite necessity for resort to armed force in self-defense: "(The claimant state must demonstrate a) necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[8] The British, knowing that the steamer Caroline was being used to transport men and supplies to Canadian rebels, had crossed the Niagra River into United States territory and, after a skirmish that cost the lives of two United States nationals, had caused the Caroline

to be destroyed. The United States protested the incursion, and Mr. Webster's words were written in disputation of the British claim of necessity.[9]

The extreme strictness of Webster's definition has been questioned by scholars of international law, as it would seem to require the target state to forbear until the trigger is being pulled and the damage about to be unavoidably suffered, which may have been acceptable in an era of smoothbore cannon and frontier musket, but which could have disasterous implications if applied to an age of precision guided missiles and multiple-warhead nuclear weapons.[10] Delivery-system capability and destructive capacity of current weaponry must necessarily be factored into the reasonableness quotient of any self-defense formula for today.[11]

Mr. Webster's contention as to the exacting nature of the requirement of necessity must also be put into the context of his position; he was the United States' spokesman as a counter-claimant against Britain's justification of self-defense, and thus one might anticipate an extremely restrictive analysis by the "plaintiff" of the defense being proffered by the opponent. The fact that the United States chose not to pursue its protest, after a perfunctory apology by the British, unaccompained by any reparation for the loss of life or property, tends to provide some evidence that even the United States doubted the persuasiveness which its own proposition might have had in front of a neutral arbitral commission.[12] For purposes of subsequent analysis

below, however, it should be remembered that Mr. Webster's formulation was addressed to an instance of claimed self-defense that was both anticipatory, that is preemptive, and invasive in nature, two elements that may exact a higher standard of definitive evidence before the threshold of reasonableness is met.[13]

2. Proportionality

If the element of necessity is met and the circumstances dictate that justice can be served only by resort to a defensive response involving armed force, the principle of proportionality requires that only such force be exercised as is necessary to deter the offending state's aggressive action.[14] All international scholars agree that the proportionality test involves at least a quantitative standard, in that the amount of counterforce exercised should not be clearly excessive to the needs of the target state in its defense.[15] On this plane of analysis, the requirement of proportionality involves the same value-conserving interests as the military concept of economy of force.[16] As a classic example of quantum disproportionality, Nazi Germany's massive invasion and conquest of Poland was claimed to have been but a defensive action to minor border skirmishes allegedly initiated by small contingents of Polish guards.[17] The Blitzkrieg response was geometrically removed from the supposed skirmish stimulus.

Given the proliferation of nuclear weaponry today and the universal concern for the containment of its actual use, most publicists would also imbue the rule of proportionality with a

qualitative factor, restricting any defensive response to a non-nuclear threat to strictly conventional weaponry. The deterrent effect of the possession of a nuclear option is highly touted, but the possibilities of escalation and world conflagration would seem to counterbalance in such an instance any contention of a defensive first-use right of even tactical nuclear firepower.[18]

3. Examples of World War II Claims to Self-Defense

The events of World War II provided the background for two notable claims to a right to anticipatory self-defense, with world opinion generally confirming the propriety (that is, the necessity and proportionality) of the one and the questionability of the other.

In the first instance, the United Kingdom was confronted with a critical dilemma in June of 1940 when the Vichy French Government came to armistice terms with Nazi Germany, for the latter lacked only the seapower necessary to effectuate the invasion of England, and the former possessed substantial fleet contingents at Alexandria (Egypt), Oran (French North Africa), and Martinique (French Antillies) which could have radically tipped the seapower scales in favor of such an invasion's success.[19] The British therefore directed communiques to these contingents' commanders, requesting that their fleets either be put under British control until the end of the war or be retained by the French but in a non-threatening status, as by proceeding to a distant port outside the war theater for the duration or by

complete demilitarization of the ships themselves.[20] The Fleet Commander at Oran rejected these alternatives. Faced with the immediate threat that the seapower of the Oran fleet presented and its implications as to the very self-preservation of the United Kingdom, the British, after further fruitless negotiations, exercised the only remaining option left to them, by attacking and substantially destroying the Oran fleet before it fell into the hands of Germany.[21]

In light of the totality of the circumstances, world opinion, with the understandable exception of the Axis powers, accepted the reasonableness of Britain's action. The exigencies of war and national survival required an immediate solution, and the Fleet Commander at Oran had declined any viable peaceful solution.[22]

In contrast to the conditions surrounding Oran, Nazi Germany invoked a claim to anticipatory self-defense to justify its invasion of Norway, in April 1940, maintaining that this violation of Norway's neutrality was necessitated by the alleged imminence of an Allied intention to occupy that strategically located country.[23] The International Military Tribunal considered this claim of anticipatory self-defense during the subsequent war-crime proceedings at Nuremberg, and although some evidence was presented which confirmed that the Allies were at the time considering the occupation of the Norwegian coast, the Tribunal concluded that Germany did not know of this evidence at the time of the decision to invade and that the invasion was based on strategic considerations, as opposed to any reasonable perception of necessity for

self-defense.[24] No question of an imminent threat to Germany was involved. On the contrary, the seizure of Norway was to increase Germany's threat to Great Britian, by the use of Norwegian airfields to bomb Britian and its shipping and the use of its Atlantic harbors for Nazi submarines and naval forces.[25] The objective of self-defense is the conservation of values; Germany's actions evidenced an objective of a unilateral extension of values.

4. Customary Law Extant at the Time of the Charter

The groundrules of necessity and proportionality (coupled with the objective judgement of the world community) were thus clearly established in international customary law at the time of the San Francisco Conference and the drafting of the Charter of the United Nations. Those groundrules, if met, allowed not only for in statu self-defense in the face of an armed attack, but also, as in the case of Oran, for anticipatory self-defense outside the threatened state's boundaries. Whether the drafters of the Charter intended to carry forward that established framework, or to substantially restrict the applicability of the right of self-defense, has been a topic of marked debate.

C. THE CONVENTIONAL LAW OF SELF-DEFENSE:
ARTICLE 51 OF THE CHARTER

Article 51 of the Charter provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken

> by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way effect the authority and the responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restate international peace and security."[26]

1. The Restrictive Interpretation

To those publicists who favor a restrictive approach to the right of self-defense, the words of Article 51 clearly indicate a demise of anticipatory self-defense, for the "inherent right" may only be exercised "if an armed attack occurs."[27] Besides the apparent straightforwardness of the language used, the proponents of this position point to the substantial potential for abuse to which the concept of anticipatory or preemptive self-defense is subject,[28] and that the danger of the doctrine in the hands of a deceitful aggressor outweighs the infrequent benefit such a doctrine might afford to a truly threatened victim. Although the possibility of a great-power veto or the oft-times weak decisional will of the United Nations membership in general relegates the United Nations peace-keeping mechanisms to a less-than-perfect model, these mechanisms were considered the best possible substitute (under the circumstances) for the individual or collective right to anticipatory self-defense that, before the Charter, had been recognized under international law.[29]

Relevant to this interpretation also is the apprehension concerning not only the evildoer wrapped in legal trappings, but also the nation who, with the best of intentions, but with the worst of intelligence-gathering resources, or with a hypersensi-

tive sense of security, might totally misinterpret the intentions of another state and thereby launch an attack which might escalate the world into a holocaust for naught. In the latter instance, the built-in protection of subsequent world review as to the reasonableness of the action might afford little solace, as given the nuclear arsenals of today, the point of no return could well be passed before such a process of world review could even commence.

In short, the view in favor of a restrictive interpretation perceives the drafters of the Charter as has having weighed these considerations and, as a consequence, having found the right to anticipatory self-defense not worth the preserving.[30]

2. The Expansive Interpretation

Contrary to this viewpoint, other scholars find difficulty in ascertaining any unambiguous meaning in the words of Article 51 itself, and, upon an evaluation of the underlying purposes of the Charter and its negotiational history, find substantial evidence of the intent to preserve the customary-law methodology surrounding the right to self-defense, including the right to the reasonable exercise of anticipatory self-defense.[31] The very word "inherent" implies a carry-over of something unalienable into the new system under the Charter, and in fact the word "inherent" would appear somewhat inarticulate or out-of-place in a sentence theoretically intended to restrict that right as previously understood. Further, as pointed out by Professor Myres McDougal, the restrictive view requires the reading into the Article of a

word that is not there, in that the phrase "in case of armed attack" must be reworded to read "only in case of armed attack."[32] By the very fact that the additional word is required to arrive at a clear statement of the restrictive view, the phrase as it stands in Article 51 remains ambiguous as to its intent.[33]

Opponents of the restrictive view refer also to the general purposes of the Charter, the foremost of which is the preservation of international peace and security. Without the deterrent effect that a right of anticipatory self-defense affords, an aggressor is emboldened and enabled to proceed unhindered with a preparation and pre-positioning of his war machinery to the point that an armed attack may not then be necessary, for the reasonable leaders of the target state can see only the futility of resistance and the certainity of innocent bloodshed. Nazi Germany used such tactics to dismember and then to eliminate Czechoslovakia as a sovereign state, through open coercion but without even the need to exercise the awesome armed force that it was clearly prepared and willing to use.[33a] As another example, Emperor Haile Selassie respected the literal interpretation of the Pact of Paris and the theoretical protection of the League of Nations and thus watched without preemptive action as fascist Italy inexorably amassed its forces on his country's frontiers. By the time Italy chose its moment to raise the attack, the ultimate outcome was left in little doubt.[34]

Given the uncertainty of the enforcement mechanisms of the United Nations, it cannot be lightly assumed that the Charter intended for a target state to forego what might be its pivotal protection, the right to anticipatory self-defense as recognized under customary international law. As one author has noted:

> The inevitable time-lag between initiation of highly intense coercion and appropriate determination and authorization by the general security organization, and the ever present possibility of the organization's failure to reach any determination at all, make such a recommendation potentially disastrous for defending states.[35]

This evaluation rings even truer in an age of nuclear arsenals and delivery systems, as to be legally bound to wait until the actual nuclear attack occurs, before being entitled to exercise one's right to self-defense, is to divest the right of any functional significance, for annihilation of the social and political fabric of the target state (the "self" that was to be defended) is by that time already guaranteed.

3. Compromise Interpretations

Between these two poles of interpretation, i.e., the restrictive view that the Charter broke with the past and limited self-defense to actual repulsion of armed attack, and the expansive view that Article 51 was intended to carry-over the customary law, including anticipatory self-defense, into the new international regime, lie numerous compromise interpretations by publicists who accept the element of armed attack as conditioning the right of self-defense, but who find various degrees of elas-

ticity in the conceptualization of "armed attack" itself.[36] The point of the actual initiation of an attack, for example, can be conceived as having occurred somewhat before any border was crossed or any missile made airborn, with various scholars opting for differing determinants as to when the preparation for attack reaches a point unambiguous enough to justify an armed defensive reaction by a reasonable and prudent target state.

These compromise interpretations, therefore, recognize the fundamental fact that the aggressor is not always he who fires the first shot[37] and in fact that a right to resort to anticipatory self-defense is not only justified by certain circumstances, but may in fact be the best solution under those circumstances in promoting the cause of international peace and security (and therefore not inconsistent with, but condusive to, greater respect for the basic purposes of the United Nations Charter). On the other hand, proponents of the compromise position are reluctant to interpret Article 51 of the Charter as a grandfather clause for the full breadth of anticipatory self-defense as recognized under pre-Charter customary international law, for they point, inter alia, to the abuses which have historically occurred in the alleged exercise of that right and the inadvertant holocaust that might occur, given the nuclear destructive force of today, were a hypersensitive nation to "jump the nuclear gun" after misinterpreting the intentions of its opponent.

4. Comparison of the Various Interpretations

It should be initially noted that almost any norm possesses the potential for misapplication or manipulation, and thus to argue, as the compromise and restrictive viewpoints do, that past instances of abuse mandate a repeal of the normative principle itself seems unjustified.[38] The fact that the abuses have been recognized as abuses tends to confirm the viability of the underlying principle, rather than provide precedent for its revocation.

No one contests that aggressors have looked on occasion to artificial arguments of anticipatory self-defense to justify their actions, but the community of states, after finding inadequate necessity or proportionality, has rightfully rejected these claims and condemned the claimants. The same would be true if the offender had attempted to manipulate a norm concerning neutrality or a freedom of the high seas; the reasonableness of his action would be subject to the decision-making process of the world community, and that process, not the claimant, would be the final judge as to the applicability of the norm in question. Norms will always be violated, but that does not detract from the propriety of the norm itself, unless the world community defaults on its decision-making responsibility, in which case, over a period of time, the particular claim will thereby become accepted as the new practice of states.

In the area of anticipatory self-defense, a direct parallel can be drawn to its applicability under domestic law, where the

initial decision to resort to defensive force must be made by the defendant under the exigencies of the moment; the ultimate determination, as to the reasonableness of the action and the subjective perceptions that led to it, remains forever within the competence of the appropriate court. The sanctioning process of the international community differs, but the need for objective decision-making does not. To deny a target state its "inherent" right to self-defense, including anticipatory self-defense where necessity and proportionality require, simply because another state may have abused the right on another occasion, results in the curious solution of penalizing the principled state, while approving the precedent of the abuser. If carried to its natural extension, such a practice would compromise all rules of conduct, leaving the law of realpolitik, that is, no law all, as the benchmark of international interaction.

To deny a wrongfully threatened state any recourse to anticipatory self-defense, under circumstances wherein all objective observers might agree that such action is the only option available if the target state is to survive, is to deny that state its very right to self-preservation, a right which constitutes the basic cornerstone of the Law of Nations and accounts for the reason that the right of self-defense is deemed "inherent" under the Charter.

Given this fact, it should not be lightly presumed that Article 51 of the Charter was intended to abridge the breadth of

this reasonable right of self-defense as it had evolved under customary international law, especially within a Charter framework which reaffirmed the rights of each state to political independence and territorial integrity and which condemned not only the use of force, but the threat of force, which might compromise these rights.[39]

Even if it were assumed that the drafters of the Charter envisioned full cooperation by the permanent members of the Security Council and thus a vastly improved world system of enforcement action against aggression, it could hardly have been presumed that the provisions of the Charter would have effectively prevented aggression, as opposed to penalizing it after the fact. Penalties gain retribution for society, whether municipal or international, and stand as a general dissuasion for such conduct in the future, but if the victim has already died, they serve as little solace in the ultimate sense.

Self-defense deals not with penalties, but with prevention. If a state's very survival has been wrongfully placed in jeopardy, it is not only reasonable for it to react, but it is unreasonable to presume that the community of nations has denied it the right to so react. The right is inherent, and the preventative nature of the right denies any anlaysis which would require that the trigger be pulled and the damage be as good as done before the right comes into play. If well-developed systems of domestic law, with consistent and effective sanctioning systems, continue to appreciate the necessity for anticipatory self-defense where

the exigencies of the moment leave no option, then it is doubtful that the drafters of the minimum world order system of the Charter, with its more diffuse and oft-times ineffective sanctioning system, intended to discard it from the Law of Nations.

It is human and national nature to resist a wrongful threat with whatever means are required. Curtailing the right of self-defense by an interpretation of Article 51 which allows for its exercise only after the trigger of aggression has been pulled cannot be expected, as some publicists argue, to better serve the anticipated goal of greater international peace and security, for it will either encourage future Ethiopias, with fascists taking advantage of the opportunity to openly position and focus the gun so that it cannot miss once the "attack" is underway (for perhaps the natural resources of the victim state are worth the after-the-fact sanctions that the world might initiate), or, in the far more likely alternative, the would-be target state will simply ignore or circumvent the unreasonably restrictive norm, as that norm exacts too terminal a price for the preventative protection it is in no position to afford.

The Cuban Missile Crisis of 1962 is an excellent example of the latter alternative -- that is, the <u>de facto</u> exercise of the right to reasonable anticipatory self-defense, but with the official explanation of the action being based upon a different juridical formulation.[40] The element of necessity was present, the limited, non-invasive response was proportional to the threat,

and the community of nations gave general concurrence to the reasonableness of the actions taken, but since the United States officially subscribes to the restrictive interpretation of Article 51, and since no actual armed attack had occurred, the U.S. refrained in its legal arguments from invoking the right of anticipatory self-defense as justification for its actions.[41]

The need for defensive action was irrepressible; no restrictive interpretation could change that. The restrictive interpretation only caused the would-be target state to alter the legal gloss, not forfeit the right to action in anticipatory self-defense. It serves international peace and security no better, and perhaps even worse, to have the necessary action be the same, but to require the employment of more international lawyers to edit and recredit the justification. As stated before, one should not lightly presume such an intent on the part of the drafters of the Charter.

To the extent that the actions of the United States during the Cuban Missile Crisis were viewed by the world community as involving justified measures of anticipatory self-defense, that crisis also serves as a precedent which moots much of the debate as to the <u>original</u> intent behind the words utilized in Article 51 of the Charter.[42] No constitutional document is frozen in time and immune from growth, as conditions continually change and circumstances, unthought of at the outset, arise to confront later decision-makers.

The Fourth Amendment to the United States Constitution, for example, concerning unreasonable searches and seizure, cannot be analyzed strictly from the chronological mindset of the 18th century, or else it is useless in dealing with electronic eavesdropping and computer technology of today. For 170 years a search was thought to require a physical trespass into a protected area (See Goldman v. U.S., 316 U.S. 129 (1942); Olmstead v. U.S., 277 U.S. 438 (1928)), which certainly was the intent of the founding fathers, but in 1967 the Supreme Court was not faced with the world of Thomas Jefferson; it was faced with a contemporary world of sophisticated sensor devices which could easily monitor a conversation from outside the area otherwise thought protected. Thus in the case of Katz v. U.S.,[43] the Court looked not only to the words of the Amendment, but also to the purpose behind the words, and it found that that purpose was to protect the right to a reasonable expectation of privacy, an interest common to both the citizens of the 1700's and the citizens of today. Given that purpose, it was clear that the Fourth Amendment protected people, not places, and it protected them from the unreasonable actions of government in general, whether by physical trespass or electronic intrusion.

It is in the nature of all constitutional frameworks to evolve to meet the dynamics of change. The United Nations Charter is no exception. If a provision can be rationally read to allow for more than one interpretation, the interpretation given

it by the practice and acquiescence of its constituents over the course of time takes on critical significance. The dispute over the original intent of Article 51 becomes more academic as precedents of accepted practice flesh out a contemporary view of its scope. The community of nations observed the actions of the United States in 1962 and a substantial majority voiced its approval, indicating a continued place for the reasonable exercise of anticipatory self-defense within the framework of the United Nations Charter.[44]

5. A Footnote on the Nuclear Prerogative

Even if one accepts the current legality under international law of anticipatory self-defense, a dilemma inherent in both the restrictive and more expansive views of Article 51 remains, as both predicate part of their analysis upon the realities of the most pressing peril of the world today: nuclear and thermonuclear armaments.[45] As mentioned above, the proponents of the restrictive view cite the clear and irreversible dangers involved in even a well-intentioned but misinformed state perceiving the need for a preemptive nuclear strike, while the proponents of the more expansive view point to the suicidal repercussions for a state which refrains from reasonable defense until the aggressor has launched its nuclear arsenal.[46] The dilemma is this: both sides are right. The nuclear dimension of destruction is in no way different, nor the probability of escalation no less real, whether the nature of the first strike is in preemptive defense

or in aggressive attack.

Once the nuclear option is exercised, the engagement of the second strike response is almost a foregone conclusion. The availability of tactical nuclear weaponry muddles somewhat the certainty of a world holocaust, but once two strike forces are escalated to a nuclear plane, the containment of the nuclear theater solely to a battlefield scenario becomes extremely problematic, as one would have to assume a situation wherein command, communication and control were still retained by proponents of reason, whereas the presence of reason may seem to have been already refuted by the command decision to initiate even battlefield nuclear warfare in the first place.

Although the post-WW II practice of states has fortunately not provided a nuclear battle precedent for analysis, the dilemma referenced above would seem resolvable only if one attaches an explicit rider to the right of anticipatory self-defense: that a preemptive strike may only be exercised on the conventional weapon level.[47] It must be granted that this restriction detracts from the would-be victim's sovereign right to make the initial determination as to the proportionality of the response to the threat, but a number of arguments point to the sui generis character of the nuclear question:

(1) Thirty years of international possession of nuclear weapons have indicated that even the most expansionist states show no enthusiasm for actually playing the nuclear card, tactical or

strategic. Thus it is not irrational for the community of states to attach in advance a per se unreasonableness to a target state's subjective perception that an opponent's nuclear threat will in fact be reduced to a nuclear attack, thus "necessitating" a preemptive nuclear strike.

(2) Given the fact that the final judgement of the reasonableness of an exercise of anticipatory self-defense falls upon the community of states, the unique nature of nuclear destructiveness justifies that in such an instance "final" judgement shall be made in advance for there may not be a community of nations available after the nuclear crossfire begins.

(3) In light of the extreme repercussions, both immediate and lingering, that a nuclear exchange will entail far beyond the borders of the two specific participants, all of the nations of the world community may effectively be called "victim participants," and thus the preemptive nuclear strike determination becomes one of collective, vice individual, sovereignty.

(4) Even assuming that the state which is to be the object of the preemptive nuclear strike does not possess a second strike nuclear capability, the reality of international interdependencies and alliances makes it all too likely that the first strike will precipitate a nuclear Sarajevo.

The proposal discussed here, i.e., that any exercise of the right of anticipatory self-defense be categorically restricted to conventional modalities, is not the law. Even though some might

argue that the entire nuclear-weapon issue has been resolved by United Nations precedent such as the condemnation and outlawing of the use of nuclear weapons voted upon in U.N.G.A. Resolution 1653 (XVI) of 1961,[48] such arguments do not seem convincing in law or in reality. Given at least the initial nonbinding quality of a General Assembly Resolution, especially in conjunction with a significant number of negative votes and absentions, and given the twenty-year interim to the present which has experienced massive nuclear-arsenal increases, vice decreases, by the superpowers of the world, it is difficult to maintain that such a Resolution was law-declaratory at the time, or that it has acquired, through customary law processes, a law-declaratory status now. An internationally binding nuclear rulebook has yet to be written; it is only suggested that reason would cause the inclusion of an explicit non-nuclear condition on any nation's preemptive-defense rights, whenever or if ever such a rulebook comes into print.

III. Methodology of Decision-Making

If one assumes then that (1) either the original intent of Article 51 of the Charter, or (2) the interpretive patina that the practice and concurrence of states has subsequently lent it, provides ample credentials for the continued legality of reasonable anticipatory self-defense under international law, the

vital issue that remains is one of decision-making methodology. To agree that anticipatory self-defense is permissible when its use is reasonable under the circumstances leads immediately to a further question: what standards of reasonableness are to be applied. As has already been noted, the question of reasonableness attaches to both the elements requisite to the right--necessity and proportionality. And if the decision-making process of the community of states concerning standards of reasonableness is to function consistently and objectively, an analytical roadmap or framework must be formulated to ensure even application.

Since the would-be target state must make the initial determination as to those two elements, it has a right to know in advance what general factors the ultimate decision-makers will value, and what approximate weight each factor will have. Certainly no triphammer, failsafe formula is possible in advance, for no two situations will be exactly the same; interpretation and judgement can never be eliminated from any decision-making process. The clearer the guidelines can be made, however, the more likely the consistency and justness of the result, and perhaps the more likely that the potential target state's determination will reflect a similar and thus hopefully more objective, analytical process.

Perhaps the major proponents of such a systematic analytical framework are Professor Myres McDougal and Florentino Feliciano, who have recommended a multifactor analysis based on the following

categories: participants, objectives, methods, conditions, and effects.[49] In each instance of a state's claim of justification on the basis of a right to anticipatory self-defense, each category or factor would be carefully weighed by the community system in order to give just consideration to the merits, vel non, of the profferred claim. A brief outline of the McDougal/Feliciano multi-factor decision-making process is provided below.

Characteristics of the Participants[50]

Certainly any analysis must begin with a clear identification of the participants involved in the threatened conflict, including their relative power status. Identification itself may be complicated by the realities of international alliances, as in the Cuban Missile Crisis, where the geographical focus centered on Cuba, but the question of coercion and counter-coercion clearly involved an international confrontation between the United States and the Soviet Union. In this era of "client states," "surrogates," "satellites," and "spheres of influence," care must be exercised in evaluating the respective breadth or narrowness of the threat posed, distilling therefrom a realistic conclusion as to the breadth or narrowness of the participant base.

The relative power status is also pivotal in analyzing the conflicting claims, as a response merited as between superpowers might clearly be unwarranted if the responding superpower were reacting to the threat of a substantially less powerful nation. As has been noted supra, Nazi Germany claimed a right of self-

defense in response to alleged border confrontations by Polish border patrols, but given the disparate power positions of the two nations, the response by Germany in 1939 of blitzkrieg and the dismemberment of the Polish State could hardly be held to have been proportional to the "threat," even if the existence of the element of necessity for some immediate response were assumed to have been present.

The Objectives of the Claimants.[51]

Under the McDougal/Feliciano analysis, the objectives of the participant claiming a right to the exercise of anticipatory self-defense must be objectively evaluated from three directions, in order to determine how closely those objectives comport with the value-conserving purposes of legitimate self-defense and the promotions of international peace and security in general. The three angles of analysis include: (1) the conservation, vice extension, of the "self"; (2) the degree of consequentiality of the threatened injury alleged; and (3) the degree of inclusivity, vice exclusivity, of the claim, i.e., the breadth of the benefits, multinational as opposed to solely national, which are to be gained from the action.

(1) Conservation or extension.

As noted by McDougal and Feliciano:

> Characterization of the real objectives of the claimant in terms of extension or conservation is most directly related to the requirements of per-

> missible self-defense. The very conception of self-defense implies that the purpose of the defender is to conserve its values rather than to extend them through acquiring or destroying values held by the opposing participant.[52]

The purportedly defensive nature of any action is called seriously into question when the "prevention" of a threat turns out to involve, for example, the extension of the claimant state's value base, territorial or otherwise. Circumstances of reasonable response may require the penetration of the other state's boundaries in order to effectively terminate the threat, but when a limited counter-offensive evolves into a status of prolonged occupation, the claim of self-defense, when viewed objectively, takes on an increasingly suspicious appearance of disguised expansionism.[53]

(2) Degree of consequentiality.

The international community ascribes varying degrees of importance to the various attributes of statehood, and, as one might expect, the higher the importance, the more reasonable a resort to force might be in the protection thereof. Thus, if the very survival of a state is imminently threatened, the resort to anticipatory force would be far more reasonable than if the "threat" had only been to the inflated honor of the offended state. The difference between a massive mobilization on the target state's border and the seizure of a few of that state's fishing boats in disputed waters is clear, and the community of

nations clearly has a right to expect a different response, both in modality and quantity.

(3) Degree of inclusivity or exclusivity.

Although not always determinative, the claim to a right to anticipatory self-defense is certainly enhanced when the claimant state can show that the response will legitimately serve the common interests of states other than itself.[54] As in the example of the Cuban Missile Crisis, the initially unilateral decision of the United States to take limited defensive action against an imminent nuclear threat by the Soviet Union redounded not only to the benefit of its own defensive needs, but also to the protection and well-being of the entire hemisphere. This inclusive dimension was confirmed by the subsequent concurrence of the Organization of American States and even the participation of some of these states in the naval operations surrounding the defensive quarantine.[55]

The Methods Employed.[56]

As noted by McDougal and Feliciano:

> The methods the claimant of self-defense employs in exercising coercion may, like those employed by the participant charged with having initiated unlawful aggression, comprise any one or all -- in combinations and sequences of varying emphases -- of the policy instrumentalities familiarly categorized as diplomacy, mass communications, control over goods and services, and armed force. Here again the relevance of modality lies principally in its utility as a crude and prima facie indicator of the general level of intensity reached by the coercion claimed to be in self-defense and, in equally rough evaluation, of the proportionality or disproportionality of the allegedly responsive coercion when measured against the necessity created by the initial coercion.[57]

Implicit in this analysis is the requirement that the threatened state must pursue peaceful methods of just settlement whenever circumstances allow, and when they do not, then only the least amount of military force necessary to effectively terminate the threat may be employed.[58] Thus the lesser the immediacy of the threat, the greater the responsibility to exhaust peaceful remedies, and regardless of the immediacy, the obligation of proportionality requires that the intensity of the response be generally tailored to the intensity of the threat.[59] Once the preventative purpose of self-defense is attained, further pressing of the preemptive strike, whether for revenge, for purposes of "teaching the other state a lesson," or for any other non-defensive motive, may be deemed by the community of nations as an independent act of aggression, and possibly as evidence of bad faith concerning even the initial intent of the claimant.[60]

Conditions Surrounding the Resort to Preemptive Force.[61]

The analysis of relevant conditions concerns both the macrocosm of world power allocation, alignment, and the objective attributes of such power centers, and the microcosm of the specific circumstances more directly involved. All these conditions impact on the reality or fallacy of the claimant state's analysis of the condition of necessity -- the condition upon which it claims to have predicated a reasonable exercise of anticipatory self-defense.

This is not to say that a factual necessity must in all cases be present in order to afford an adequate basis for a preemptive response. The "facts" as perceived by the target state are also important, but those perceptions must prove to have been reasonable when analyzed from the total context of events.

The state which, for example, precipitously mobilizes on the border and issues a short-fuse ultimatum to the neighboring state may secretly have no intention of pressing an attack, should its bluff fail, but if the massively orchestrated bluff produces a preemptive strike response, the bluffing state may not easily argue that the response was not necessitated by the apparent conditions at hand. On the other hand, if a hypersensitive state, on insufficient information, perceives an erroneous necessity to strike first and ask questions later, it cannot expect the community of states to accept its misguided neuralgia as a legitimate basis for the action taken. Both fact and perception are important, but the conclusions drawn must in each instance be reasonable.

Effects.[62]

The category of analysis concerning effects dovetails closely with the category concerning the methods employed, both addressing as they do the element of proportionality. Assuming that the modality of military force is necessitated by the surrounding circumstances, the quantum of force exercised must approximate,

i.e., must not substantially exceed, the gravity and intensity of the threat to be repelled. The principle of economy of force is particularly applicable to a claimed exercise of anticipatory self-defense, given its basis in prevention of injury to the "self," rather than infliction of unnecessary injury to the threatening state.

The utilization of the McDougal/Feliciano analytical framework does not guarantee a correct conclusion or "foolproof" decision-making process. Guidelines of analysis can only assist the decision-makers, not replace them. The need for judgement and interpretation in any process always ensures the possibility of error or bias. What such an analytical framework does supply, however, is a systematic, multi-factor approach, thus forcing the decision-maker to evaluate the full fabric and complexity of the claim, affording a broader base not only for the decision, but for future discussion and open debate concerning the decision itself. It is an improvement to ensure that the community procedures surrounding the analysis be consistent, even if the ultimate decision, for extraneous reasons, may not be.[63]

IV. Case Studies: Afghanistan and Osirak

A. A PRELIMINARY PROFILE: THE CUBAN MISSILE CRISIS

Before attempting to analyze in detail the self-defense claims of the Soviet Union and Isreal concerning Afghanistan and

Osirak, it might be useful to initially itemize particular factors involved in the United States' response to the Cuban Missile Crisis, for even though the Soviet Union condemned those actions as "piracy,"[64] and even though Isreal and its U.S. Senate supporters have sought to cite the United States response in 1962 as supportive of their current claim,[65] the contrasts between the 1962 quarantine and the current claims are worthy of note.

Among the salient factors surrounding the 1962 crisis were the following:[66]

(1) The fact of growing Soviet influence and involvement in Cuba was patent and direct.

(2) The evidence concerning the clandestine and rapid build-up of nuclear weapon sites with transnational-strike capability was carefully documented and conclusive.

(3) The evidence was expeditiously published to the world community to allow independent analysis of the United States' position.

(4) The security interest involved was hemispheric and the limited actions implemented had hemisphere-wide approval.

(5) From the outset, only the minimum of force necessitated by the circumstances was exercised. The quarantine:

(a) was implemented only after repeated warnings;

(b) was limited in geographical scope;

(c) was limited in duration;

(d) was limited in designation of material that was to be diverted (if cargo) or removed (if already in statu);

(e) involved only diversion, vice seizure, of shipping;

(f) involved no destruction of property or life;

(g) involved administrative procedures which minimized the disruption of regional shipping; and

(h) was totally non-invasive, i.e., territorial integrity was never compromised. The suggestion of preemptive "surgical" strikes on the missile sites was rejected by President Kennedy and actual use of active force even on the high seas was specifically reserved as only a last-resort option.

(6) Organs of the United Nations were advised from the outset, its good offices were afforded opportunity to assist in the negotiational process, and its services were sought for the proposed on-site verification of the missiles' removal.

It is not suggested here that all of the factors listed above were required by international law to justify the measures taken by the United States. It is only suggested that each played its part in ensuring the positive international response as to the overall reasonableness of the limited measures taken and each can be looked at as a positive precedent and a profile against which other claims may be compared.

B. THE SOVIET UNION AND AFGHANISTAN

1. Fact Description

On December 23, 1979, the CPSU official newspaper Pravda carried an article which began with the following bold print:

> WESTERN, AND PARTICULARLY AMERICAN, MASS MEDIA HAVE RECENTLY BEEN DISSEMINATING DELIBERATELY INSPIRED RUMORS ABOUT SOME SORT OF SOVIET "INTERFERENCE" IN AFGHANISTAN'S INTERNAL AFFAIRS. THINGS HAVE EVEN GOTTEN AS FAR AS ALLEGATIONS THAT SOVIET "COMBAT UNITS" HAVE BEEN INTRODUCED IN AFGHAN TERRITORY.[67]

On December 24, these "rumors" faded into reality, as the formal Soviet intervention into Afghanistan began, with the airlifting of Soviet troops and supplies continuing around the clock throughout the 25th and 26th.[68] On December 27th, the head of the Afghani socialist state, President Hafizullah Amin, was overthrown, "tried," and executed by the new Soviet-imposed regime led by Babrak Karmal, a former Deputy Prime Minister who had been "exiled" abroad by the majority Khalq leadership, but who was airlifted to Kabul from eastern Europe by the Soviets once the initial intervention force had secured the capital.[69]

On December 28th, the first official public Soviet acknowledgement of the military events was made over Moscow radio, stating:

> The Government of Afghanistan, taking into consideration the continuing widening intereference and provocation of the country's external enemies and in order to defend the gains of the April revolution, territorial integrity and national independence and to maintain peace and security, and basing itself on the treaty of friendship, good neighborliness and cooperation of December 5, 1978, has appealed to the U.S.S.R. with an urgent request to provide immediate political, moral and economic aid, including military aid.[70]

The announcement was concluded with the simple statement that the Soviet Union had "met the request of Afghanistan."[71]

On December 31st, in the first authoritative Soviet printed explanation of the Russian involvement, Pravda provided the following rationale:

(1) that "external imperialist forces formed a direct collusion with the internal counterrevolutionary forces" in order "to push Afghanistan off the chosen road";

(2) that internal reactionaries were "receiving unlimited backing from the imperialist circles of the United States and Beijing (Peking) leaders . . . lavishly supplying the counterrevolutionary gangs with weapons, equipment, and money";

(3) that the Soviet Union "will not allow Afghanistan's being turned into a bridgehead for preparation of imperialist aggression against the Soviet Union";

(4) that Amin had "teamed up with the enemies of the . . . revolution"; and

(5) that the Soviet Government, acting under the terms of the 1978 Soviet-Afghan friendship treaty and Article 51 of the U.N. Charter sanctioning self-defense, granted the Afghan Government's "insistent request" for Soviet assistance and sent in a "limited Soviet military contingent" to be used "exclusively for assistance in rebuffing the armed interference from the outside, as these "imperialist forces" were "determined to deprive the Afghan people of the opportunity to enjoy their rights . . ." [72]

On Janaury 12, 1980, in an interview by Pravda, Soviet President Brezhnev reemphasized the same arguments concerning U.S. violations of, and Soviet compliance with, international law in relation to Afghanistan. Casting aside any accusations of Soviet expansionism, Brezhnev reconfirmed that the "policy and mentality of colonialism are alien to us. We do not covet the lands or wealth of others."[73]

As of July, 1981, nineteen months after the initial invasion, 80,000 to 100,000 Soviet troops remain in Afghanistan.[74]

2. Analysis

a. The "Invitation" Claim

If one accepts at face value the Soviet contention that its troops were provided only at the request of the Afghani Government, and that their continued presence is with the approval of that Government, then no issue of anticipatory self-defense is presented. It is not the purpose of this paper to thoroughly analyze the "invitation" contention, but some comments are necessary to put this Soviet contention in context, both general and specific.

General Context.

Historically, the Soviet Union has relied on the "invitation" contention on numerous occasions, and in each instance, the world community of states has found the facts to be non-supportive of the claim.

In 1940, the Soviets' move against Finland was claimed to be at the request of the Finnish Government, but not the Government recognized by all nations in Helsinki. The Soviet Union claimed that that government had abandoned the true socialist interests of its people, and therefore Russia "recognized" a more "progressive" government in the north, which requested Soviet intervention.[75]

In 1956, the Soviets' military intervention in Hungary with 200,000 Russian troops was claimed to have been by invitation, but not by the liberal communist government of Imre Nagy, which was recognized by the world community, but by the "more representative" counter-government of Janos Kadar.[76]

In 1968, the Warsaw Pact incursion into Czechoslovakia was claimed to be by invitation, even though it was not until Alexander Dubcek, the recognized head of the Czech government, was removed to Moscow after the invasion that he signed a protocol "accepting" the military "assistance," after which he was first displaced as head of state and ultimately expelled from the Czech communist party.[77]

Thus, within the Soviet outlook on international law, an invitation need not precede the arrival of the "guest," nor must it proceed from the duly-constituted and internationally recognized Government of the "requesting" state. The "invitation" or "request" need not even be documented and provable, because under Soviet socialist ideology, the invitation is a standing one; it

may be presumed.

This presumption of invitation, which serves as a justification for Soviet intervention any time and anywhere, stems from three basic tenets of Soviet socialist international law: (1) the right of national self-determination (applicable to all non-socialist states); (2) the right of socialist self-determination (applicable to all socialist states outside the Soviet Bloc); and (3) the principle of socialist internationalism (applicable to the Bloc countries). These tenets and their impact on the Soviets' perception of the world power process merit consideration here, as they directly relate not only to the first claim of the Soviet Union vis-a-vis Afghanistan -- i.e., that Soviet presence was and continues to be at the Afgahnis' request -- but also to the much broader issue concerning the parameters of the Soviet Union's assertion of its right to exercise anticipatory self-defense, or the so-called "bridgehead" claim.[78]

The Soviet Concept of National Self-Determination.

Under the Soviet conceptualization of international law, states are admitted to possess a right to sovereignty, to territorial integrity, and to non-interference by external elements in their internal affairs. Socialist states are therefore legally insulated from any expansionist encroachment by the capitalist nations of the West. The nations of the West, however, are not entitled to a reciprocal level of insulation, as capitalist

states and their sphere of client states are nonprogressive and nonrepresentative of the true socialist interests of their citizens.[79]

Under the Soviet theory of national self-determination, therefore, the concept of "state," as it applies to the West, is expanded, and "state" recognition is extended to "progressive" (i.e., socialist-oriented) national liberation organizations, as these organizations represent the popular sovereignty of the suppressed masses.[80] In light of the irreversibility of the process of class struggle and social revolution within the capitalist countries, the progressive and irrepressible nature of the national liberation organization entitles it to current recognition as a state, even though it has not yet attained its full political maturity. Once recognized as a "state," principles of peaceful coexistence entitle it to socialist assistance to fend against the capitalist interference with its sovereignty, and thus even though the "popular" movement is occurring within the territorial boundaries of a capitalist state, it is the capitalist forces which are guilty of the illegal interference, not the external socialist forces of peace which offer their mutual assistance and support to the fledgling arm of the people.

It is true that the territory of a state is inviolable, but territory belongs to nations and peoples, and principles of popular sovereignty and national sovereignty require that territory be used in accordance with the "genuine" interests of the

people. The de jure capitalist government is thereby unilaterally characterized as illegitimate, and one by definition cannot be guilty of interference in the affairs of an illegitimate government.[81]

Soviet and other socialist countries' aid, including military weaponry and manpower, to selected national liberation organizations in states outside the socialist sphere of influence is thus not only permitted, but is virtually obligated under the socialist view of international law, whereas any similar move by a capitalist state to assist a resistance movement within a socialist state would constitute a categorical violation of sovereignty and territorial integrity, since once a state adopts a socialist system, an identity of interest between the people and the government exists, and therefore the concepts of popular sovereignty and state sovereignty coalesce, foreclosing the possibility that any future rebellion could be anything but reactionary, counter-revolutionary, and against the true interests of the people.

The Soviet Concept of Socialist Self-Determination.

Although a capitalist state is thus legally foreclosed from interfering in the internal affairs of a socialist state, no such legal impediment is considered to exist when, in the perception of the Soviet Union and its socialist allies, "assistance" is required to aid a non-Bloc socialist state which seems in danger of

losing its socialist character. Under the doctrine of socialist self-determination, such assistance, which might superficially appear to be interference, is in fact cooperative support provided to protect against any interference in the socialist rights of that waivering state's peoples and is thus a collective effort to protect the mutual gains of communism.[82]

If, for example, a movement should begin within a non-Bloc socialist government toward political pluralism or toward renewed private ownership of exploitable property, that is, a movement away from basic socialist principles, a violation of the people's trust is deemed to have occurred. As an identity exists between socialism and the best interests of the people, any slippage back toward the bourgeois values of the past denies the people their right to the socialist path they have "chosen." The cause of the slippage can thus not be attributable to the people, but must be the result of capitalist subversion, counter-revolutionary dissidents and/or corrupted leadership which is no longer deserving of the support of the people. The popular sovereignty of the people must be protected, for it is they who are the state, and it is they who have determined to embrace the progressive principles of socialism.

Based upon the theoretical dichotomy between the Communist Party of the Soviet Union and the Soviet state, such "stabilizing" assistance, if accomplishable by means other than military force, may be afforded through party, vice governmental, channels, thus,

again in theory, removing any possible implication of illegal interference under international law, as that law proscribes such interference only at the inter-state level.

The Soviet Concept of Socialist Internationalism.

Similar to, but more comprehensive than, the principles of socialist self-determination, the concept of socialist internationalism defines away the basic dualism of peaceful coexistence in its disparate application to the Bloc by "tempering" the concepts of sovereignty, territorial integrity, and noninterference with more "progressive" principles such as mutual identity of interest, collective self-determination, and socialist sovereignty.[83]

Under the "universal" theory of peaceful coexistence, two distinct subcategories are thus distinguished, based upon the level of "progressiveness" that the individual state has achieved. In the West, therefore, where, as has been noted, class struggle continues and where the true interests of the people continue to be suppressed, principles of peaceful coexistence must provide for on-going dialecticism and world evolution toward socialism, and thus the concept of just wars of national liberation and the jus cogens principle of outlawry of colonialism apply. Within the Bloc, however, such considerations simply do not attach, since the dialectical synthesis to a higher, more progressive form of government has already occurred. The natural bond that exists within the Bloc is characterized as Socialist Interna-

tionalism, which implies a forfeiture of some of the trappings of individual state sovereignty in favor of the collective Bloc, based on the identity of interest and commonality of purpose that these more progressive states share.[84]

Under the broad principles of fraternal assistance, socialist international division of labor, and complete commonality of interests in the furtherance of goals and objectives of communism, the socialist states within the Bloc are deemed to have evolved into more "selfless" sovereigns, allowing part of their independence to wither away in favor of collective self-determination. Matters become internal to the Bloc, not internal to the individual state, as each Bloc state must conduct both its foreign and domestic affairs in consonance with the collective harmony of the whole. Further, since the Soviet Union is the most experienced in the building of communism, it ipso facto (or more appropriately, ipse dixit) becomes the senior partner in determining what is "harmonious" and what is not.[85]

With each of the doctrines outlined above - national self-determination, socialist self-determination, and socialist internationalism -- the result can be seen to be the same: that the victory of socialism, under the Soviet approach to international law, is a one-way street. Wherever capitalism exists, the people retain their right to exercise self-determination in favor of socialism, but wherever socialism exists, the right is already deemed to have been irrevocably exercised, permitting of external

intercession only by other socialist countries in the common quest of protecting the permanence of the choice.

It might be noted that the same principles of socialist collectivity operate domestically within the U.S.S.R. Given the Soviet Union's status as the largest geographical country in the world,[86] and possessing as it does some 170 ethnic components,[87] the centralizing concept of "socialist patriotism" is a practical as well as ideological necessity if ethnic egocentrism and intranational factionalism are to be avoided. The would-be sovereignty of the Union Republics must be defeased, and the essence of centralism must control over the appearance of federalism. Form is significant only in its pragmatical effect (e.g., to justify U.N. membership for the Ukraine and Byelorussia);[88] form has no significance when it might interfere with the absolute control by the Party/State. A Union Republic might have a "right" to secede,[89] but to exercise that "right" would be contrary to the best interests of socialism, and therefore subject to immediate infusion of federal "assistance."

Thus, regardless of the location in which a movement might begin, the Soviet[90] concepts of international law afford the U.S.S.R. the flexibility necessary to justify its interference for the promotion, or the enforcement, of socialist goals. If, in Transcaucasia, an ethnic Armenian uprising were to occur, such a movement could be brutally suppressed within the Armenian Soviet Socialist Republic, and actively supported across the frontier in

Turkey, all under the "universality" of peaceful coexistence and the Soviet East-West analysis of "self-determination."

Given the above discussion, concerning both the historical and ideological background of the Soviet conception of "requested assistance," the general credibility of the Soviet claim of same in the specific instance of Afghanistan would already seem marginal. When one then analyzes the specific facts surrounding the alleged Afghan invitation, the credibility of that claim becomes nil.

As noted above, the recognized Afghani Government on the eve of the Soviet intervention was headed by Hafizullah Amin, who had recently survived a coup attempt by Nur Mohammed Taraki.[91] Both men were powerful leaders within the nationalistic Khalq faction of the socialist forces which had established the Democratic Republic of Afghanistan in 1978.[92] Although the coup attempt by Taraki was assumed to have been supported by the Soviets (as Taraki had just come from a stopover in Moscow and Amin was known to be considered "too independent" by the Kremlin), the Soviets continued to publically support Amin after Taraki died in the aborted coup.[93] Just 90 days later, however, on the 24th of December 1979, the massive airlift of Soviet troops began, and within three days, Amin was overthrown and executed[94] by a new Soviet-imposed regime led by Babrak Karmal, a member of the more doctrinaire Parcham faction of the Afghani socialist movement.[95] As stated earlier, Karmal and other Parcham leaders had been air-

lifted to the Afghani capital of Kabul from Eastern Europe by the Soviets, but only after the capital was under effective Soviet control.

Thus once again the Soviet Union, upon announcing that its "assistance" had been "repeatedly requested," was asking the world to believe (a) that the recognized Afghani head of state had requested external assistance in effecting his own execution; (b) that a group of "exiled" Afghanis had the right to request Russian "assistance" without the approval of the recognized Afghani government in Kabul; or (c) that the Soviet Union unilaterally had the right to act upon the legal fiction of a "standing invitation," in its self-perceived role as the guardian of the true principles of socialism and its acute ear for hearing the real wishes of the people, vice the wishes of the internationally recognized government of Afghanistan.

As might be expected, the world was somewhat less than convinced. On January 14, 1980, by a vote of 104 to 18, the community of nations, sitting as a body in the U.N. General Assembly, adopted a stiffly worded resolution that "strongly deplored" the invasion and called for an "immediate, unconditional, and total withdrawal" of foreign troops,[96] and the Third World, with its decision-making advantage of being neutral,[97] voted 78 in favor of the resolution and only 9 against (with 18 abstentions and 10 absentees).[98]

b. The "Bridgehead Claim.

Perhaps realizing that it had played its "invitation" card far too often, the Soviet Union inserted into its official list of additional justifications (see p. 37 above) at least one that appeared to involve a claim of a defensive right vested directly in the Soviet Union, i.e., that regardless of whether the alleged violations of Afghani sovereignty by the "interference from the outside" had not alarmed the Afghani government sufficiently into calling for collective defensive assistance from the Soviets, the Soviets had a right to unilaterally take whatever action they deemed necessary, including the invasion of a sovereign neighbor, to counter those "imperialist forces." As stated in the Soviet Union's official explanation, the Soviet Union "will not allow Afghanistan's being turned into a bridgehead for preparation of imperialist aggression against the Soviet Union."[99] This unilateral security interest was further amplified during the interview of Leonid Brezhnev by Pravda on 12 January 1980, where he provided an elaboration of the "bridgehead" claim as follows: "Acting otherwise would have meant passively watching the creation on our southern border of a source of serious danger to the security of the Soviet state."[100]

Thus in the absence of any credibility to the "invitation" claim, the fallback claim becomes one of a right to the exercise of anticipatory self-defense, to prevent the possible creation of an ideologically unfriendly state on Russia's southern flank.[101]

To fully evaluate this latter claim, the McDougal/Feliciano analytical framework will be applied below to the salient factors involved in the Afghani question.

Participants.

The central participants are clearly the Soviet Union and Afghanistan, the former a world superpower and the latter a minimum power force. According to the Soviet "outside threat" theory, the United States and the People's Republic of China would also be considered participants,[102] the former being the other major world superpower and the latter being a substantial world power if only due to its large geographical and population base and its military potential. The claim that these countries constitute additional, and in the eyes of the Soviet Union, pivotal participants in the Afghani question has in the last 19 months been supported by the claimant with almost no concrete evidence. In comparison with the clear photographic documentation provided by the United States during the Cuban Missile Crisis, the Soviet Government has relied only on stock phraseologies. This lack of concrete proof is especially noteworthy, considering that the official explanation in Pravda had specifically stated that the "imperialist circles of the United States and Beijing" had "lavishly"[103] supplied guns and equipment to the "internal reactionaries," and given the magnitude and professionalism of the Soviet intelligence system, one would assume that photographic documentation of the supply lines of such a

lavish program could easily be obtained.[104]

It is interesting to note also that repeated independent press reports coming from within Afghanistan have documented the facts to be the exact opposite of the claim, in that the vast majority of the weaponry of modern vintage utilized by the Afghani guerrillas, or mujahaddin, are of Soviet, vice Western or Chinese, manufacture, with Kalashnikov AK-47 automatic rifles and Soviet-field weapons being the main military staple of these "internal reactionaries."[105]

The weapons reportedly come from two sources: (1) materiel captured in skirmishes with Soviet or Afghani army troops or in clandestine raids; and more importantly (2) material supplied directly by the massive defection of soldiers from the Soviet-equipped Afghani army.[106] Estimates of the size of the Afghani army prior to the Soviet incursion ranged from 80,000 to 100,000; current estimates set the number at perhaps 20,000.[107] Further reports coming out of Afghanistan reflect that the defection problem is so acute and the loyalty of the remaining Afghani army to the current Karmal regime so questionable that almost all Afghani troops have been transferred away from the capital of Kabul (which is now "protected" almost exclusively by Soviet forces),[108] and issuance of Soviet weaponry such as handheld SAM anti-aircraft launchers to the Afghani army has been completely terminated, since these weapons consistently end up in the hands of the mujahaddin, who put them to good use against the Soviet's

major ace-in-the-hole for mountain warfare, the MIG24 helicopter gunship.[109]

When one compares these reports to the Soviet claim of lavish imperialist involvement, the claim seems transparent at best. Such factual analysis however is inconsequential from the Soviet ideological viewpoint, for just as they feel the right to presume an "invitation" for "fraternal assistance," they likewise presume the existence of imperialist aggression. This presumption stems from the same Marxist-Leninist concepts discussed above: the irrepressible struggle of the masses against the colonial and neocolonial masters, the inherent aggression of the imperialist forces, the world-wide confrontation between the reactionary forces of war and the socialist forces of peace, and the vanguard position of the CPSU in leading the forces of peace and in interpreting the true principles of communism. Lavish imperialist support for any counterrevolutionary movement need not be verified; under Soviet ideology it is a given.

The world decision-making process, however, deals not with ideology, but with objectivity and universality. The Soviet claim must be held up to the same standard of proof as required of any other claimant, and its claim as to the expanded participant base vis-a-vis the Afghanistan question fails under that standard.[110]

Objectives.

(1) Inclusive or exclusive.

Viewing the Soviet claim as a unilateral right to exercise a preemptive act of force in the protection of the security of its southern border, its increasingly more permanent incursion into Afghanistan appears to serve no inclusive interests, regional or otherwise.[111] The actions were deemed necessary to insulate its borders, its territorial integrity.[112] Further, once the claim concerning an "invitation" is rejected for lack of a factual basis, the necessary implication arises that the Soviet security needs take precedent over the sovereign rights and territorial integrity of Afghanistan. If one follows the Soviet claim to its natural conclusion, the world legal order is being asked to subscribe to the contention that the Soviet Union may exercise massive force as a valid defensive action against another nation whenever, in its ideological perception, that neighboring country poses a potential for adopting a governmental form deemed unfriendly by the Russians. The benefit of such a contention is exclusive solely to the Soviet Union, and flies in the face of the inclusive values underlying the principle of the sovereign equality of states.

It might be further noted that, whereas in the Cuban Missile Crisis the inclusive hemispheric aspect of the United States' actions were concurred in by both the OAS and the NATO allies, in the instance of Afghanistan the presence of Soviet troops has even been questioned by a number of other communist movements.[113]

(2) Conservation or extension.

As has been succinctly stated by Professor W.T. Mallison:

> The national objectives of the nation-state claiming lawful self-defense should be appraised in terms of the genuineness of the element of conservation of values as opposed to their extension. The self-defense concept on its face involves conservation of values rather than destruction or acquisition of values of the opposing participant.[114]

Nineteen months after the initial incursion, the Soviet presence and control in Afghanistan is undiminished. The facts reflect a drastic extension of Soviet values at the cost of Afghani political independence, as massive invasion has become prolonged occupation. Russian ambitions concerning control of Afghanistan date back well into the 19th century, when the expanisionism of the tzars confronted the colonialism of the British empire.[115] The Soviet Union cannot expect the world to accept the new ideological explanation, when it functionally compares so closely with Russia's imperialist past.

(3) Consequentiality of the Values Sought to be Protected.

If the issue at hand dealt with an immediate threat to the very survival of the Soviet Union, that very high level of consequentiality would certainly have justified some defensive action. If, for example, the United States, in complicity with the Government of Afghanistan, were to have clandestinely launched a massive build-up of transnational-range nuclear missile sites in the Hindu Kush north of Kabul, aimed at, and with a striking capability extending to, the Ural Mountains deep within the Soviet state, the precedent of the Cuban Missile Crisis would

militate in favor of justifying a Soviet defensive response similar to the limited actions employed in 1962 by the United States and its hemispheric neighbors.

The "threat" perceived by the Soviet Union in the Afghanistan instance, however, is many times removed from the above hypothetical, as the Soviets appear to claim an anticipatory right to defend against the potential of even an alliance between Afghanistan and the United States. Again, in the words quoted from Pravda: the Soviet Union "will not allow Afghanistan's being turned into a bridgehead for preparation of imperialist aggression against the Soviet Union."[116] Reflecting back to the Cuban Missile Crisis, and recalling that the Soviet Union termed the limited actions taken by the United States "piracy," such a claim would mean that the unacceptability of the threat, and the necessity for far more invasive action, arrived not when the missiles were emplaced, not even when Castro actually adopted a socialist form of government and embraced the Soviet Union, but even before that, at the point when the potential for such a change of events arose.

Suffice it to say that the community of nations is not willing to discard the principles of territorial integrity and political independence of states in favor of such an unlimited principle of individual state security. The consequentiality of the latter in relation to the fundamental nature of the former is minimal.

The Methods Employed.

Given the conjectural and distant nature of the threat perceived by the Soviet Union to its security, the principle of proportionality and the lack of immediacy would dictate that peaceful avenues of resolution be utilized. Whether by diplomatic demarche between individual governments, referral of the matter to an organ of the United Nations for appropriate consideration, by political protest, or by economic initiative, the Soviet Union was free to air the perceived grievance and attempt to accomplish its resolution by methods consistent with world public order. Instead it continued to publicly support the Amin regime after the ill-fated coup attempt in September of 1979,[117] such support itself being an indication of the low order of the "threat" to which the Soviet Union was quietly preparing to coercively respond.

Eschewing any peaceful or even limited coercive alternatives, the Soviets chose as their first response an intensity of coercion that the intensity of the "threat" would not have warranted even as a last resort. Even if one assumed, for the sake of argument, that the consequentiality of the security interest claimed was adequate and that the necessity for some defensive action was present, no justification for the quantum of coercion exercised, and which continues to be exercised, can be extracted from any objective reading of the facts. The "piracy" of the limited quarantine in 1962 is quite pallid in comparison with the

invasion and occupation of a sovereign neighbor by 100,000 Soviet troops.

Conditions Surrounding the Resort to Preemptive Force.

The most important condition requisite to any lawful exercise of anticipatory coercion is the presence of an adequate degree of necessity under the circumstances presented. As discussed above, the "bridgehead" apprehension of the Soviets as to potential "imperialist aggression against the Soviet Union" was little more than a conjectural worst-case analysis. A socialist regime which it publically supported was still in power in Kabul, the civil war that was continuing in the Afghani mountains had been going on at a relatively steady level of intensity for some time, and the "enemies of the revolution" were not imperalistic, but Islamic.[118] If the Amin government suffered from any major instability, the cause was neither the West nor Islam, but rather the political infighting between the socialist factions themselves.[119] No dramatic shift in this state of affairs, no element of intense immediacy, and no cry of Russian alarm, precursed the Soviet decision to intervene.

The facts do clearly indicate that the Soviet Union was secretly displeased with Prime Minister Amin, and that the events in Iran, coupled with the Islamic threat that the mujahaddin posed to the Democratic Republic of Afghanistan, was causing the Soviet leadership no insubstantial amount of concern due to the ramifications that a Pan-Islamic movement might have on the 45

million muslims in nearby Soviet Socialist Republics,[120] but neither displeasure over foreign leadership nor concern over domestic religious problems provides a state with a degree of necessity upon which to predicate an immediate and intense external response of invasion. (Nor, it might be added, do either of these latter factual concerns have much to do with a fictional claim of an imminent imperial bridgehead.)

The initial determination concerning the presence of the element of necessity lies with the threatened state, but if that state is to convince the ultimate decision-makers of the reasonableness of its determination, it must produce for the community-of-states' consideration more than ideological conclusions and distended speculation.

Effects.

As discussed supra, the highly intense response exercised by the Soviet Union bore no relationship to the remote and conjectural threat perceived. Even assuming, arguendo, that the threat to Soviet security merited a coercive response, the immediate election of any extremely high intensity of force and the prolonged application thereof in no way comported with the gravity of that security threat. Limited actions to protect the immediate area of the Soviet border, or limited peripheral raids to interdict the supposed "lavish" flow of imperialist supplies, were never attempted. Elected instead was what might be called the "Axis approach" to problem solving: the massive infusion of

force, the overthrow of the established government, and the creation of a Quisling regime, which then "requests" the foreign military force to remain to "protect" it.

Further, the fact that the Soviets remain in full force in Afghanistan after 19 months can only serve to detract even more from the credibility of any claim that the original intent of the incursion was based on considerations of self-defense.[121] The underpinnings of self-defense are grounded in protection, not extension, of national values.

Analysis of the Afghani question under the McDougal/Feliciano multi-factor framework leads to a clear conclusion: that the Soviet incursion and continued presence in Afghanistan cannot be justified under any legitimate claim of self-defense, whether viewed from the standpoint of necessity or proportionality. The ultimate decision-makers, sitting as the United Nations General Assembly, have twice, by overwhelming majorities, concurred in this conclusion.[122]

In spite of this international condemnation, the Soviet Union continues to reject international proposals of a negotiated settlement that would allow for the withdrawal of its troops, even proposals that would guarantee international neutrality for Afghanistan and thus remove the potential "threat" of an imperi-

alist bridgehead, which supposedly was the precipitator and remains the raison d'etre for the Soviet presence. The reason for the refusal of the Soviet Union to negotiate is tragically ironic: the world community will not commit itself in advance to recognize the legitimacy of the Karmal regime.[123]

The irony stems from the tenets of the Soviet ideology discussed above, for Soviet military interventions have consistently been coupled with a recognition of a request from the true arm of the people, not the "reactionary" established leadership who have become "enemies of the revolution." Thus the Soviets have built a cordon sanitaire of obedient satellite states through a practice of "derecognizing" the leadership of the state it wishes to invade, but now it cannot understand how the world community can attempt to interfere in the "internal affairs" of Afghanistan[124] by refusing to agree in advance to recognize the regime that the Soviets -- for now -- choose to support.[125]

Afghanistan continues to be a political disaster for Russia, especially in the Third World,[126] but the Soviet goose must continue to cook because the world gander dares to require "equal rights" regarding recognition.

C. ISRAEL AND OSIRAK

1. Fact Description

(Isreal, invoking national security considerations, has refused to comment on much of the detail concerning its aerial attack on the Osirak nuclear reactor site outside of the Iraqi

capital of Baghdad. The following brief reconstruction of what transpired is a distillation taken from various newspaper sources.)

On June 7, 1981, an Israeli aerial-attack force took off from Etzion Air Base, heading south into the Gulf of Aqaba.[127] The force consisted of some six F15 fighters and eight F16 fighter bombers, all of United States manufacture[128] and all provided to Israel under a standing 1952 agreement requiring that such weaponry "be used solely to maintain its internal security, legitimate self-defense of areas of which it is part, or in the United Nations collective security agreements . . . ."[129] The attack force swung east across the northern portion of Saudia Arabia[130] (and perhaps portions of southern Jordan),[131] with the Israeli pilots using Arabic in their communications to avoid detection of their identity.[132] Just before sundown, and after having traversed more than 1000 miles of Arab airspace, the attack force approached the Iraqi nuclear reactor site of Osirak near Baghdad and commenced a high altitute raid using 2000-pound conventional bombs, causing severe damage to the complex.[133] The Osirak plant was still in the last phase of construction and had not yet gone critical.[134] The raid lasted approximately two minutes, with the attack force returning by an undisclosed route to Israel (the shortest distance would involve overflight of Jordanian airspace after exiting Iraq).[135]

More than 24 hours passed before any official Israeli announcement of the raid was made,[136] reportedly because Israel believed that Iraq might be too embarrassed to disclose the success of the Israeli strike. The Israeli Government finally made the announcement after stating that a report of the raid had been made earlier on Radio Jordan.[137]

In announcing the attack, Prime Minister Menachem Begin stated that the action was conducted in "supreme, legitimate self-defense."[138] Israeli justifications for the necessity of the preemptive action and its timing were as follows:

(1) that the Osirak plant was intended to produce nuclear weapons;[139]

(2) that a secret chamber had been built 40 meters under the reactor so that bombs could be made there without detection by the International Atomic Energy Agency ("I.A.E.A.");[140]

(3) that Iraq had refused to allow the I.A.E.A. to inspect the reactor;[141]

(4) that I.A.E.A. safeguards and inspection techniques were inadequate in any event to detect potential diversion of bomb-grade radioactive material;[142]

(5) that the President of Iraq, Saddam Hussein, had stated in the Baghdad newspaper Al Thawra on October 4, 1980: "The Iranian People should not fear the nuclear reactor, which is not intended to be used against Iran, but against the Zionist enemy";[143]

(6) that France and Italy had been corrupted by their need for oil and thus had cooperated with Iraq without imposing adequate safeguards to ensure that the plant would only be used for peaceful purposes;[144]

(7) that United State intelligence officials informed Israel that Iraq was preparing a nuclear bomb soon;[145]

(8) that the reactor was scheduled to become "critical" (go on line) as soon as early July, and thus no further delay of the attack was possible;[146]

(9) that the bombing of the plant before it became critical involved humanitarian consid ations, as Baghdad, only 12 miles away, might otherwise be showered with radioactivity;[147]

(10) that the attack was conducted on a Sunday to ensure that the French technicians would not be working and thus not subject to injury;[148]

(11) that Israel had tried to use every diplomatic avenue available;[149]

(12) that no ceasefire or armistice had ever been agreed to between Iraq and Israel, and thus a "technical state of war" existed dating back to 1947;[150]

(13) that Iraq refused to recognize Israel's right to exist;[151]

(14) that even President Kennedy had stated during the Cuban Missile Crisis: "We live in a world in which not only pulling the trigger is an imminent danger to war";[152]

(15) that the reactor posed a mortal threat to the very survival of Israel;[153] and

(16) that the Israeli Government would never allow a repeat of the Nazi holocaust, and that to allow a nuclear bomb to hit Tel Aviv could be likened to the poisoning of Jewish children in the gas chambers of the Nazis.[154]

Concerning the reasonableness of the actions taken, Deputy Defense Minister Mordechai Zippori stated: "The definition of Israel's defense will be decided by Israel's government and not by any other government, no matter how friendly."[155] The overall Israeli position was reflected in a statement by Prime Minister Begin, in what might be called the Begin Doctrine: Israel will not permit "any enemy to develop weapons of mass destruction against the people of Israel."[156]

2. Analysis.

In no reported instance subsequent to the aerial attack has the Israeli Government made any direct or indirect reference to Article 51 of the United Nations Charter in justifying its claim concerning self-defense.[157] This may be due to at least two diverse reasons: (1) it may have realized that its main supplier and almost sole international supporter, the United States, has at least officially adcpted the restrictive view of that article,[158] and since the facts involved do not approach an "armed attack" by Iraq or even the imminent threat thereof, a claim to self-defense versed under Article 51 of the Charter would only have compli-

cated Israel's efforts toward persuasion of the United States as to the legality of Israel's actions; and (2) the invocation of the Charter here would be inconsistent with Israel's consistent policy of downplaying the importance and credibility of the United Nations in general, as Israel, like South Africa, feels that the United Nations has compromised its objectivity in its respective case, for example by officially recognizing and granting official observer status to the PLO[159] and SWAPO.[160]

Regardless of whether Israel looks to the Charter or looks through the Charter (via the word "inherent" in Article 51) to the underlying customary law of nations, the critical elements necessary for the validity of any claim to anticipatory self-defense remain the same: necessity and proportionality.

These elements, as they apply to the Israeli claim, will first be analyzed generally under the McDougal/Feliciano framework, and then as they pertain seriatim to the 16 individual justifications outlined supra.

Participants.

The core participants are clearly Israel and Iraq. The State of Israel is unquestionably the relative superpower in the Middle East. It possesses the most highly trained fighting force and the highest level of American-supplied firepower in the entire region. Iraq is a military power but of markedly lesser status, and its primary source of weaponry, the Soviet Union, has

recently strained its ties with Iraq by associating itself more closely with Syria and by expressing neutrality concerning Iraq's ongoing conflict with the revolutionary government of Iran.[161] That conflict has also drained Iraq militarily, thus widening the relative power gap between itself and Israel even further.[162] To compare the participants in one other pertinent dimension, Iraq is a signatory of the Nuclear Non-Proliferation Treaty ("NPT")[163] and is a participating member in the I.A.E.A. safeguard program; Israel is a signatory to neither.

The discussion of participants cannot, however, end there. Saudi Arabia (and, depending upon the route of the Israeli attack force, Jordan) may be considered as involuntarily participating, for its/their airspace was utilized as a flight path by the Israelis for access to Iraq.[164]

Further, the question must be raised as to the participant status of the United States, even if one assumes that it had no advance knowledge of, and gave no explicit consent to, the Israeli action. Without the massive United States economic and military aid that has been and remains the very power base of the State of Israel, it would not possess the means nor the confidence to attempt an Osirak operation.[165] This is not to say that vicarious state responsibility attaches simply because of a "but for" scenario, but where the Maecenas State continues its level of generosity after becoming aware over a period of time of repeated

abuse being made of the support provided, especially under a pattern of constantly expanding claims to self-defense,[166] then at some point the lack of advance knowledge by the Maecenas of an action under an even broader defense claim no longer entails a presumption of lack of indirect responsibility. At some point the sponsor state must be confronted with the common law doctrine of respondiat superior. Israel has associated itself with that doctrine, for example, in its commando raid on Beirut Airport in 1968.[167] That raid served to penalize the Government of Lebanon for its claimed continued support of Paelstinian terrorism. The specifically stated purpose of the raid in 1968 was to punish the supporter enough so that the support might stop, since without that support the illegal activities of those supported might likewise be forced to stop.[168] The shoe is now on the other foot, and the international community has a right to look to the United States to see if the shoe fits.[169]

Objectives.

(1) Inclusive or exclusive.

Prime Minister Begin has mixed few words in expressing the exclusivity of the Israeli claim. When asked about regional reaction, he stated: "I don't care about the Arab world. I care about our lives."[170] He later commented: "I must concern myself with the people of Israel . . . and everything else is peripheral."[171] Given such clarity, further discussion seems superfluous.

(2) Conservation or extension.

If one for the moment assumes that an imminent threat of high intensity did exist and that the only defensive alternative available was the use of armed force, then the "surgical" nature of the aerial raid could be considered as comporting with the positive principle of maximizing the conservation of common values. (Those pivotal assumptions, however, appear unfounded, as will be discussed in detail infra.) No critical threat to Iraqi political independence was involved; no occupation force implanted; no damage inflicted beyond the destruction of the precise source of the perceived threat.

Even if one accepts, however, the argument of a "technical state of war" (which will also be discussed in more detail infra) to validate the "defensive" coercion imposed upon Iraq, a more difficult question concerning extension of values arises in relation to the violation of "nonbelligerent" airspace. Israel's intentional overflight of Saudi (and perhaps Jordanian) territory implies a further claim by Israel: that it has the right to ignore the sovereignty of a neutral state in order to gain access to its enemy's position.[172] The community of states, and Belgium in particular, might find such unilateral extension of rights disturbing, as it takes as its premise the same principles of Notrecht that Germany attempted to claim as a defense in both World Wars. Israel's repeated condemnation of Nazi atrocities

is well-taken, but that must include the Nazi practice of calculated violations of neutral rights under international law.

It might also be noted that during the 1973 Yom Kippur War, the United States respected the airspace rights of its NATO allies who refused to cooperate in the efforts to resupply Israel in the "defense" of its occupied territories. Only Portugal consented to the use of its facilities as a stopover point for the United States supply line, and only Portugese facilities were in fact used.[173]

The solution to Israel's dilemma concerning military access to Iraq in time of "war" is not to disregard the sovereign rights of other intervening states, but to finally and forthcomingly resolve the question of Palestinian self-determination and sovereignty, for that may well dispel any need for military access to Iraq. Israel might claim that such is idle idealism, but it is the essence of realism in comparison to any contention that Israel can continue to survive by, and continue to expect United States support for, further bombings of the Osiraks of the future.

(3) Consequentiality of the Values Sought to be Protected.

As was stated in the multi-factor analysis of the Afghani question, the consequentiality of the very survival of a state is extremely high. If Israeli survival were imminently threatened, its right to exercise proportional defensive measures to effect the termination of that threat would be unquestioned. But just as in the comparison of the Afghani situation to the Cuban Missile

Crisis, the Israeli contentions concerning an imminent threat to survival do not comport with other admitted facts. Unlike the Cuban Missile Crisis, no missile sites were on the Iraqi horizon, no nuclear warheads were in place (or even in production). The Begin Doctrine and the Bridgehead Doctrine do not require that. Both claim the right to prevent even the potential of such. Again, in Mr. Begin's words: Israel will not permit "any enemy to develop weapons of mass destruction against the people of Israel."[174]

Even if each and every one of the 16 assertions of Israel itemized above were accepted as true, the first actual completion of a nuclear weapon by Iraq, even by the most liberal of Israeli estimates, was more than a year away. To take such a conjecture, with its hypothetical imminence of a year hence, and to put it next to the photographic facts of the Cuban Missile Crisis, and then to discern in the former instance an immediate need for a higher intensity of coercive response than was taken in the latter, is to ascribe to the Israeli people a right to geometrically greater security than any other nation.[175]

Insecurity is inherent in sovereignty. The right to anticipatory self-defense is not available to alleviate that insecurity when time and opportunity remain for attempting peaceful, and hopefully more permanent, solutions.[176]

The Methods Employed.

The Government of Israel claimed that diplomatic and other peaceful modalities for resolving the perceived threat had been thoroughly exhausted and that preemptive force was the only just course of resolution that remained open. Unfortunately for the credibility of that contention, one does not have to look far to find at least three diplomatic avenues which were avialable but unutilized.

(1) The nation that Israel decried as being primarily responsible for the introduction of nuclear technology in Iraq was France, and yet even though a new French Government had recently been installed which was markedly more sympathetic to the Government of Israel and markedly less sympathetic to nuclear proliferation, Israel made no honest attempt to contact that new government on possible peaceful initiations before launching its raid on the still uncompleted reactor. The public affairs office of the Israeli Foreign Ministry, when asked why this positive political development was not pursued, stated only that Israel made no distiction between the governments of Giscard and Mitterand and that "for us, it is a continuous government."[177]

Such a bland and disinterested appraisal of such a major political development,[178] with such direct relevance to the specific threat perceived, can only serve to underline, in a different dimension, the conclusiveness of the Israeli Defense Ministry's comment quoted above concerning Israel's perce tion of its de-

fense rights being exclusively a matter for Israeli determination. It simply made no difference what France might have been able to immediately effect in concessions from Iraq; Israel would not trust those safeguards any more than any other safeguards not imposed directly by Israel. Diplomacy is thus a non-option from the outset, for diplomacy requires cooperation with other states, and Israel does not trust any other state. Only its "safeguard" program would satisfy it -- destruction.

(2) It was a well known fact at the time of Israel's decision to bomb that the influence of the United Staes in Iraq was on the ascendency, given the growing strains on Iraqi-Soviet relations,[179] and that the new American administration saw positive opportunities for a new Mideastern intiative to achieve a reorientation of the region away from the Soviet camp. Given this new United States window of influence in Iraq, one might expect Israel to turn to the United States, its only consistent supporter, to attempt to put pressure on the Iraqis and the French for additional measures in "pacifying" the Osirak nuclear complex.[180] But, once again, such an alternative would require diplomacy and trust, and thus falls victim to the same Israeli position of unilateralism discussed above.

Israel is quick to refer to the United States as an "ally," but the term is not appropriate, for an alliance implies a two-way street. Israel approaches the United States strictly from a

"supply-side" perspective, demanding massive arms and aid while simultaneously insisting on the right to jeopardize vital American strategic and economic interests whenever and where ever it chooses. The Israeli concept of "alliance" is as elastic as its concept of self-defense, and it is a true testimony to Israel's self-imposed isolation that it has no trust even in its only "ally," who has long given it unquestioned and unquestioning support for its ever-expanding perspective of "self-defense."

It has been exactly 25 years since an American president, Dwight David Eisenhower, forced Israel to recognize and respect the constraints of international law. It is perhaps ironic that the reason that Israel (and much of the world) does not trust the United States is due to the international naiveness of America, and the naiveness is no more graphically reflected than in its blank-check approach to Israel over the last quarter of a century.[181]

(3) The third diplomatic alternative disregarded by Israel implicates the inconsistency at the very core of the Israeli arguments concerning the inadequacy of international nuclear safeguards. It is strained indeed for a country to defend a coercive act on the basis of the shortcomings of an international regulatory process, when that country has never joined in, or even attempted to cooperative with, that same regulatory process. If Israel were truly concerned with the improvement of the system of international safeguards, it would sign the NPT and work within the I.A.E.A. system. It is difficult for a nation to

argue the necessity for coercive force due to a possible potential for abuse of certain international regulatory standards, when that nation has rejected those standards altogether for itself.[182]

Israel is thus demanding not only that it be allowed to possess the bomb while coercively deterring that option to others, but it is regaling an international regulatory system for inadequately protecting it, while it does nothing to even afford the agency an opportunity to assist it. It is a basic claim to rights without responsibilities, sovereignty without reciprosity.

Conditions Surrounding the Resort to Preemptive Force.

Israel is certainly correct that the central issue of *necessity must be* resolved in each instance by the threatened state. To demand that this determination be conclusive, however, and not subject to world community review, is to demand the unilateral domestication of all rules of international conduct.[183] Once each state is granted to be bound only by its own judgement, it is effectively bound by no law at all.

Given Israel's lack of trust for Europe, for America, for the I.A.E.A., for the United Nations, or for anything else except its own coercive exercises in self-help, it is little wonder that Israel perceived the presence of imminent necessity concerning Osirak.[184] Under such a perception of universal persecution, necessity for coercion is presumed and continuing, just like the element of a "standing invitation" under Soviet ideology.

If only Israel is to judge Israel's action, then one must wonder why Israel even bothers to explain its actions. What sense does it make to claim a legal basis for one's conduct, when one is both the claimant and the decision-maker for that claim, and the decision has already been made.

Each of Israel's 16 justifications will be analyzed subsequently, but the philosophical question remains: who is Israel even trying to convince by those justifications if it is to be its own judge. The answer seems relatively clear, it must be trying, with increasingly less success, to convince itself.[185]

Effects.

Once the necessity of coercive action was perceived by Israel, the quantum of force elected was at least of less intensity, of less permanence, and of less destruction of life than exercised by it on numerous occasions in the past.[186] But this relative factor of proportionality is not only irrelevant to the issue of factual proportionality, which will be discussed in connection with the analysis of the 16 proffered justifications, it is of insignificant importance in comparison with the greater issue of effects raised by the aerial attack -- the precedential impact of the action on the future conduct (or misconduct) of states.

The post-war years have witnessed a gradual and painstaking accommodation by the community of nations to the undesirable, but as yet unavoidable, application of "balance of power" principles

as the fundamental deterrence mechanism to nuclear weapons' use. The accumulation of second strike capability has been established as the key to nuclear defense, for that capability ensures notice to one's opponent that the stakes are too high, that initiation of a nuclear attack is in effect suicidal. The world has chosen to live with this insecurity, for it is the mutuality of that insecurity that has made it so singularly successful.

Israel has now announced to the world a new alternative: develop nuclear weapons of one's own and then bomb anyone who might attempt to do likewise; demand the right for a personal nuclear option, and then destroy the facilities of anyone who might demand an equal right.[187]

This alternative might not be so singularly unreasonable if one were to accept the Israeli position that its situation is unique and that its need for security is superior to that of any other member of the community of states, but international law stands for the antithesis of preferential treatment: in the eyes of that law, there can be no "chosen" nation.

Pakistan, for example, is equally dwarfed by the size of its less-than-cordial neighbors: to the southeast is nuclear India, with whom it has gone through as many wars and border battles as Israel with the Arab states, and from whom it is similarly divided by historical claims and religious fervor;[188] to the North lies the Soviets in Afghanistan, bound by friendship treaty to India and undoubtedly already eyeing the "imperialist-bridgehead"

potential of Pakistan;[189] and to the West is the fanaticism of Iran, with its claim to being the vanguard of the Islamic, not just the Iranian, Revolution. Once Pakistan joins the unofficial nuclear club, may it satisfy a portion of its insecurity by bombing the nuclear reactor at Tarapur? Or what of Taiwan, or South Korea, or Lybia? Every state is insecure and every state is unique. That is precisely why each state cannot be the ultimate judge of its own conduct, for an unrestrained right to "defend" against insecurity leads directly to a law of the jungle; a jungle now equipped with ICBM's.

THE 16 JUSITIFCATIONS.

As has been noted, even if each and every justification for the raid were true, the element of immediate necessity, which is so critical to the legal exercise of anticipatory coercive force, would seem to be lacking. This lacking is compounded, once those 16 justifications are held up to objective analysis.

(1) Osirak was "an atomic bomb-producing plant."[190]

This description of the Osirak plant by Prime Minister Begin is at a minimum inarticulate, for at the time of the attack, the plant was not producing anything, let alone atomic bombs.

When the contention is reworded to read "once the plant is operable, its intended purpose is to attempt to produce weapons-grade material, which, once the necessary technology and scientific know-how are mastered, will be used for the manufacture of

atomic bombs at some indefinite point in the future," much of the claimed imminent-threat impact immediately dissipates, and thus it may be assumed that Mr. Begin's formulation is not inarticulate, but intentional. Even reworded, however, the contention constitutes only a subjective Israeli analysis of Iraqi intent, which the world community, in its decision-making role, must carefully evaluate using the objective facts present. Israel thus submitted justifications (2) through (8) as "proof" of that intent.

(2) A secret subterranian chamber for bomb making was located 40 meters below the reactor.[191]

France, whose technicians were responsible for every phase of the construction of the 70 megawatt reactor at Osirak, immediately repudiated this spy-novel charge as "fantastic."[192] Mr. Begin then retreated to a new position saying that the alleged inner sanctum was only four meters below the main structure.[193] The contrast between the original and the revised claim is the difference between a deeply buried military bunker and the average depth of a normal basement. The new depth description led most observers to believe that Mr. Begin had apparently "confused" a space utilized as a widely publicized spent-fuel-reprocessing area for a clandestine Iraqi Manhatten Project headquarters. Such "confused" information hardly makes for convincing evidence of an absolute necessity for violent anticipatory self-defense.

(3) Iraq refused to allow I.A.E.A. inspections.

This contention simply is not true. One inspection was

cancelled at the immediate outset of the Iraqi-Iranian War, but other than in that one instance of national-security considerations, the I.A.E.A. has been unhindered in its periodic inspections of Osirak, the most recent being in January 1981. Another inspection was scheduled for mid-June, but by that time the Israelis had destroyed the plant.[194]

Such a contention is also somewhat incredible considering the source, since Israel has never signed the NPT and never allowed I.A.E.A. officials anywhere near its nuclear facility at Dimona in the Negev Dessert. Dimona is not only beyond the construction stage and fully functioning, outside the regime of any international safeguards, but, given the recent disclosures by former Israeli Defense Minister Moshe Dayan, Dimona may, quite articulately, be described as an atomic-bomb producing plant.[195] For the pot to claim anticipatory self-defense based on the blackness of the kettle is hypocritical, and even more so when the facts reflect that even the pot's accusation is unfounded.

(4) I.A.E.A. safeguards are inadequate for detection of non-peaceful diversion of radioactive material.

This contention is also hypocritical, for <u>any</u> safeguards are more adequate than <u>no</u> safeguards. In any event, not only did the I.A.E.A. immediately contest the Israeli assertion,[196] but scientist after scientist has come forward to confirm that such an undetected diversion would be extremely difficult to accom-

plish.[197] During the Senate Foreign Relations Committee hearings on the Israeli attack, only one witness, Mr. Roger Richter, seemed convinced that an undetected diversion was probable. Mr. Richter, who claimed to have resigned as an I.A.E.A. inspector so as to be able to testify fully as to the shortcomings of the I.A.E.A. vis-a-vis its inspection capabilities at Osirak,[198] admitted under questioning that he had never been to Osirak, and in fact had never even been to Iraq.[199]

Mr. Richter's prepared testimony also took as a starting point the fact that all of the I.A.E.A inspectors thus far having visited the reactor site have been either Soviets or from Bloc countries, clearly implying an East-West issue ("keep in mind that any adverse conclusions you (the Soviet inspector) might reach as a result of your inspections would have to take into account your country's sensitivity to how this information might affect relations with Iraq").[200] Under questioning, however, he admitted that the Soviet record on non-proliferation has been excellent.[201]

Even this key witness for the Israeli position did not present a cogent case for the probability of success of any Iraqi effort to surreptitiously extract weapons grade material without detection. On page 12 of his prepared testimony he assumes that the inspector must prepare himself "mentally to ignore the many signs that may indicate the presence of clandestine activity . . . ."[202] If there will be "many signs," then how can one maintain

that the non-peaceful purpose would be undetected? If there will be "many signs" in the event that these "clandestine activities"[203] should commence in the future, then where is the Israeli necessity now, based only on untested hyphothesis, to resort to highly intense self-help.

Concerning the element of the immediacy of that "necessity," it is interesting to note that Mr. Richter also tesified: "I believe that the Iraqi nuclear program was organized for the purpose of developing a capability to produce nuclear weapons, over the next several years."[204] Thus even if Mr. Richter's opinion concerning the subjective intent of Iraq were correct, Israel had a window of "serveral years" in which to seek peaceful termination of the nuclear-capability development program. It thus becomes ever clearer that Israel was not "forced" to take violent action because of any immediacy; Israel was forced to use violence only because any peaceful demarche would have further exposed the double standard of Dimona[205] Israel would quite reasonably be asked to peacefully play by the same rulebook, and that "price" was simply more than Israel was willing to pay.[206]

One further quote from Mr. Richter would seem apposite here. "We must all work together on this problem (of nuclear proliferation). There can be no more important task."[207] Rather than working together, Israel chose to operate alone, both at Dimona and Osirak.[208] Israel sees its important task not to be nuclear non-

proliferation, but nuclear superiority.

(5) Iraqi President Hussain made clear his intent to use the reactor "against the Zionist enemy."

The much heralded quote from Al Thawra was clearly cited by Israel to bolster two prongs of its overall argument: (1) that the reactor was intended to produce nuclear weapons, and (2) that those bombs were unmistakably intended to be utilized against Israel. It is clear that Israel wanted to show the world that it was to be the target, that it was the clear victim of the "threat" and thus the appropriate state to respond, for Iraq has at least two more immediate enemies, including its arch-rival Syria, and its current opponent in war, Iran. Thus, in order to avoid the appearance of paranoia, Israel utilized the quote as patent proof of its contention.

Unfortunately for the Isareli position, it subsequently was forced to admit that the quote did not exist![209] Given the initial accusation as to the exact publication, the exact date, and the exact words, it is incredible to believe that the claimant's "error" was an error at all. One must assume that if Israeli pilots can speak Arabic, then Israeli intelligence gatherers can read Arabic adequately enough to check whether a Baghdad newspaper quote exists or does not exist.[210] Suffice it to say that the facts concerning Osirak's being intended for non-peaceful purposes are far less conclusive than the fact that Israel's "evidence" was intended as propaganda.[211] Bringing claims such as

deeply buried secret chambers and fictional quotes before the community-of-nations decision-making forum is not conclusive on that forum; it is contempt of that forum.[212]

(6) France and Italy compromised all principles of nuclear safeguards in their lust for oil.

As has been noted earlier, Israel does not trust any other nation, and frequently it substantiates that mistrust on the basis of reducing the world's value system to a unidimentional plane: the lust for fossil fuel.[213] Any criticism, however constructive, of Israeli actions consistently precipitates some orchestration of the motif that the critic has sold out to the oil interest.[214] The approach is blatantly ad hominem, but in conjunction with the constant invocation of the Nazi holocaust and intimations of anti-semitism, the manuever has been relatively successful in enabling Isreal to avoid any serious discussion of more difficult issues.[215]

Aside from this diversionary aspect of the Israeli contention, the facts again do not substantiate the claim. During the Senate hearings on Osirak, it was noted by a number of experts that Iraq had made efforts to obtain a different type of nuclear reactor, but that since that reactor type was too amenable to the production of weapons-grade material, no one would sell it one. It is difficult to perceive how that fact comports with any theory of absolute petrodollar power or oil corruption of the nuclear marketplace.[216]

Further, it should be noted that even the Giscard Government had agreed to the Osirak project only on the condition that French technicians remain at the facility until 1989, thus ensuring a watchdog capability above and beyond the I.A.E.A. inspection cycle.[217] That this agreement was not made public is of little solace to the Israeli argument, for one must remember that Israel claimed to know about secret chambers and other "reliable" secret information about the plant. If its intelligence system can claim the ability to detect fictional secrets upon which to predicate a justification for an attack, it is not too much for the world community to ask that it turn up a few factual ones also.

Mr. Begin is also proud of his intelligence system at the highest levels of the United States government,[218] and thus, since the Giscard technician provision was inserted in the Iraqi agreement at the prompting of President Carter, it is less than credible to assume that Israel knew nothing of the provision.[219] It is more consistent to assume that Israel knew, but again refused to consider anything short of its self-help solution as adequate for its perceived needs.

(7) United States intelligence had informed Israel that Iraq was preparing a bomb soon.

This assertion served two Israeli purposes: (1) to broaden the base of its otherwise unilateral claim, and (2) to broaden the gap between the United States and the Arab world, as

the assertion clearly (and, one may assume, not inadvertantly) implies U.S. involvement in at least the preliminary activities that finally led to the raid. The latter purpose is reprehensible and again points out the monocular view of Israel as to its "alliance" with the United States; U.S. political, economic, and foreign policy interests were not only not considered, they were attempted to be manipulated for Israel's parochial benefit.[220]

As to the former purpose, i.e., of broadening the base of the claims, the assertion lost all value when, on the 16th of June, Israel's chief of military intelligence confirmed that no such information had been conveyed to Israel by the United States. The assertion, after having done its U.S./Arab damage, was simply retracted.[221]

(8) The reactor was to come on line as soon as early July.

This assertion was intended to bolster the immediacy of the "threat" and thus the necessity for decisive action. Its accuracy has been directly contested by French nuclear experts, who stated that the plant was not scheduled to come on line (become critical) until the end of the year, five to six months further away.[222] Press accounts also report that Israeli intelligence had informed the Israeli government of this added time frame before the attack, but that information apparently changed neither the decision to attack nor the formulation of the assertion that subsequently was released for public consumption.[223]

Even if one accepted arguendo Israel's early July timeframe, that would mean that Israel still had almost a month in which to interact with the new French government and the fledgling Reagan Administration concerning peaceful alternatives that might be arranged. More importantly, it meant that Israel might have a new government before the Osirak "critical" day was reached, as the Israeli election day was scheduled for the end of June. Mr. Begin was thus not only not willing to trust peaceful initiatives with other nations, he was not even willing to trust the Israeli electorate.[224] The immediacy, or lack thereof, of the reactor start-up date would thus not appear to have been the critical factor in the decision to bomb, but the immediacy of the election day and the effect that the spectacular raid might have on the electorate. Opposition candidates were thus trapped, either having to support the extremely successful operation, and thus the Prime Minister who conceived it, or to raise honest questions as to its legitimacy and thus to suffer an unpatriotic image and Mr. Begin's cries of "sabotage."[225]

Even if one were to assume that Mr. Begin intended no such domestic political advantage from the attack, the political implications are there, and that is one of the multitude of factors that distinguishes the raid on Osirak from the Cuban Missile Crisis. President Kennedy had bipartisan domestic and unanimous hemispheric support for his actions, and that is a major benefit of collective defensive action: not only does it

increase the likelihood that the defensive action ultimately chosen will have been objectively evaluated and the threat objectively perceived, but it serves to remove even the aura of self-serving intentions and ulterior motives.

During the Senate hearings, one witness for the Israeli position attempted to show that the Iraqi president was committed to nuclear destruction of Israel since he needed an external enemy to divert attention from his domestic shortcomings.[226] This argument is sadly ironic, for the sudden upsurge of bellicosity of Mr. Begin during the days before the Israeli election, with renewed incursions into Lebanon, a new crisis with Syria,[227] and a new "defensive" initiative at Osirak, served him well in avoiding the homefront issues of 130 percent inflation, increased emigration by the educated class, and other unpopular reflections on the Begin government.[228] The pot once more is only enlightened as to the blackness of the kettle.[229]

(9) The timing of the bombing was humanitarian, for once the reactor was "hot," any bombing would irradiate Baghdad.

On a strictly emotional plane, the contention concerning humanitarian considerations for the citizens of Baghdad comports somewhat awkwardly with the Begin quote: "I don't care about the Arab world. I care about our lives."[230] Even if one were to concede Mr. Begin's humanitarian concern, however, the factual plane again runs contra to the contention. Expert testimony during the Senate hearings and a new Congressional Research publication

confirm that if the plant had been bombed in the same manner after the reactor had come on line, irradiation would have extended "perhaps a 1000 yards."[231] Baghdad is 12 miles away from Osirak.

Either the humanitarian consideration was mistaken, in which case Israeli intelligence gathering is once again found wanting, or the humanitarian argument was another orchestration of Israel trying to convince itself.[232]

(10) The attack took place on Sunday, to ensure that French technicians would not be injured.

This humanitarian contention would seem to contradict the preceding humanitarian contention, for if one is so concerned with the Iraqi citizens in Baghdad, why is one only concerned with the French technicians at the reactor site.

That question aside, the facts again disprove the contention. Contrary to Israeli intelligence reports that those workers would be off on Sunday, the French technicians took their days off on Friday, the Moslem day of rest.[233] The point seems minor (except to the French technician who died in the attack), but when aggregated with all the other Israeli "intelligence" shortfalls mentioned in preceeding headings, it shows that, although the Israeli airforce is exceptionally skilled, the information base, upon which Israel justified the use of that airforce, was abysmally poor.[234]

(11) All diplomatic avenues had been exhausted.

This contention was discussed thoroughly supra. Given the five to six months that the Israeli Government had even before the plant was to be operable, and the several years that even Mr. Richter admitted would be needed before the Iraqis would possess even the capability for producing nuclear weapons, the striking down of Osirak only two weeks after France had elected a President sympathetic to Israel and unsympathetic to proliferation can hardly be called the exhaustion of diplomatic avenues. Israel trusts no nation, however friendly, but somehow it trusts its intelligence gathering system, however unintelligent.[235]

(12) A "technical state of war" with Iraq justified the action.

It is true that, since Israel and Iraq have no common border, no armistice agreement was signed by those nations at the conclusion of the first Arab/Israeli war (1947-1949). Three points need be made however.

(a) Article 2(4) of the United Nations Charter, which preserves and expands the spirit of the Pact of Paris concerning the renunciation of the use of force as a national instrument of policy,[236] provides as follows:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.[237]

The article says nothing about war, and certainly nothing about a technical state of war.[238] Unless the force is allowed for under some other provision of the Charter, and thus consistent with it, the force or threat of force violates the Article. The assertion of a technical state of war thus adds nothing to the Israeli argument, for it must still go to Article 51 (self-defense) in order to make its argument/claim concerning the justified exception to the general rule, and once it gets there, it is again confronted with the requirement of showing that necessity and proportionality existed.

(b) The very fact that Israel claimed the bombing of Osirak to be "supreme, legitimate self-defense" implies that Israel is aware that a state of war does not justify all acts of force that a nation at war may choose to take. To claim that it did would compel the conclusion that the aggressor's acts of force are justified, if it only remembers to declare war first. That is clearly why Israel was careful to claim self-defense, for defensive acts of force are justified in the face of aggression (whether during war, or any other scenario of illegal coercion). Thus, once again the fact of a technical state of war adds nothing to the formula, for the formula only pivots on the presence of the elements of self-defense; necessity and proportionality.

(c) Aside from these legal points, a more visceral point might also be made. If a nation is truly committed to peace in a region of the world, and if it discovers that more

than three decades ago it concluded no armistice with another state with whom it had been at war, would that peaceful nation presume a technical state of war and take action to renew it, or would it presume a prescriptive state of peace and take steps to formalize and preserve it? The question is only hypothetical; the history of the Middle East is extremely complex. But the Palestinian question is not hypothetical, and as long as Israel is unwilling to address it directly and settle it justly, Israel will have no need to dust off "technical states of war," for it can expect a profusion of new wars until the issue of self-determination is finally resolved.[239]

In the words of Nahum Goldmann, former president of the World Zionist Organization and founder of the World Jewish Congress:

> It is an irony of fate that now that the Arabs have expressed a willingness to discuss peace under certain conditions, the dominant tendency in Israel lacks the necessary flexibility to take advantage of this new situation.
>
> As a result, Israel is increasingly isolated politically and faces a growing danger of losing the support of world public opinion. The greatest threat to Israel today if not Arab arms and the lack of financial means but the slow erosion of world sympathy, particularly among the progressive nations that have always supported Israel.[240]

(13) Iraq refuses to recognize Israel.

This statement is also true, as a basic expression of the Iraqi position.[241] But Israel's demand to be recognized raises additional questions. Which Israel should Iraq recognize? The Israel the United Nations created in the Partition Resolution of 1947? The expanded Israel of 1949? The Israel which claims

"Judea and Samaria," and speaks only of distant autonomy, but never sovereignty, on the occupied West Bank?[242] The Israel which claims all of Jerusalem in fee simple absolute?[243] The Israel in the Golan Heights, in the Gaza, in the Sinai? The Israel of Haddadland and whatever airspace it chooses in the rest of Lebanon?[244] The universal Israel of The Jewish People?[245] Or finally in the instance of Osirak, the Israel with the claims to overflight rights in Saudi Arabia and Jordan?

Recognition implies boundary definition and finite limits to sovereignty.[246] The Israelis, not the Iraqis, seem most uncertain about these concepts.

To speak momentarily in parables, let one assume that tomorrow Iraq were to state that it would recognize the Israel of the Partition Resolution of 1947. Israel would surely respond: "That is ancient history. Many wars have brought new changes. Circumstances and realities are now different." To that Iraq might quietly reply: "But no my friend. Just yesterday we heard it proclaimed that a technical state of war continues from the first great conflict, and if that first war is still with us, then surely the issues that that war presented are still unsettled. The interim has changed nothing."[247]

The moral of the parable is this -- when one makes a multitude of claims, one must take care that they are consistent.

(14) President Kennedy would subscribe to the Israeli position, for he saw that danger can be "imminent," even though

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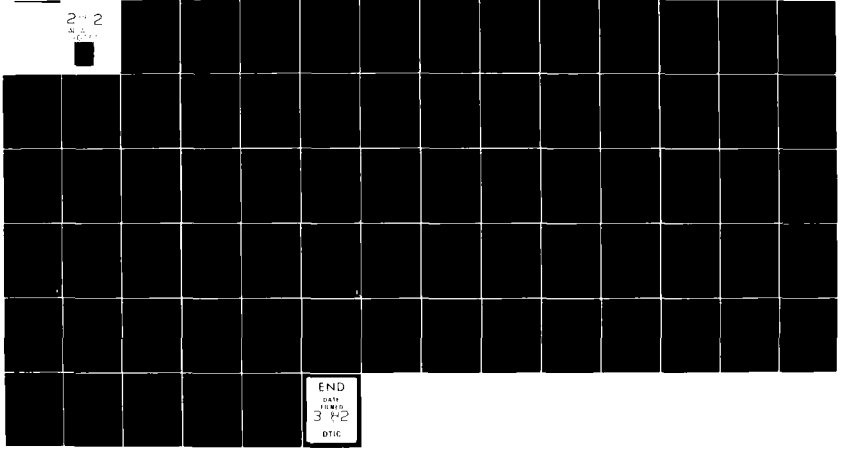

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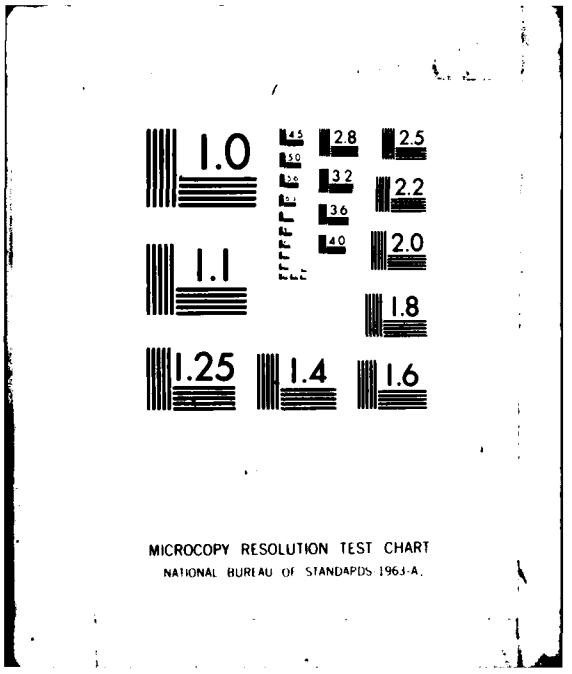
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the trigger has not been pulled.

To extract a quote from the context of the Cuban Missile Crisis to support the definition of "imminent danger" as perceived by the Israelis in the context of Osirak is to invite a comparison of the two fact situations to see if the contexts truly align. A side-by-side comparison of the salient conditions in each is provided below.

Cuban Missile Crisis	Osirak Reactor Question
(1) Nuclear weapons were present and in place	(1) No nuclear weapons present; nuclear reactor that might make the materials necessary for nuclear weapons was not even completed
(2) Evidence of the nuclear weapons' sites photographic and conclusive	(2) Evidence that plant might somehow secretly produce weapons grade material conjectural and based on numerous retracted or discredited contentions
(3) The evidence was expeditiously published for world consideration before any destructive damage inflicted (in fact no destructive damage was ever inflicted)	(3) Contentions published "posthumously," after the unilateral destruction of the reactor[248]
(4) The security interest involved was hemispheric and the actions implemented had hemispheric approval	(4) Unilateral
(5) Defensive action implemented was low in intensity and totally non-invasive	(5) Action implemented was invasive and destructive

(6) Higher level of coercive intensity was reserved as a last resort	(6) Intense response elected as first resort
(7) United Nations was involved to play a positive role	(7) United Nations ignored

In short, to compare the trigger-that-had-not-yet-been-pulled scenario of the Cuban Missile Cirsis to Osirak is an exercise in futility.[249] The United States was looking down the barrel; Iraq had not even completed the factory that might someday produce the gun.[250]

(15) The reactor posed a mortal threat to Israel's very survival.

This is not a justification, it is a conclusion drawn from all the other contentions -- contentions, one must add, that, when evaluated objectively, do not add up to the conclusion.

(16) The playing of the Holocaust card.

When all else fails, Mr. Begin is quick to "play the Holocaust card." It seems to make little difference that the Nazis fled to South America and not to Iraq. Iraq, and the whole world, must share the guilt and the responsibility for the atrocities of Auschwitz. To Mr. Begin, it is as clear as the catechismal credo of original sin; all must not only recall and regret it, they must continue to repay The Jewish People for the debt of suffering that can never be fully repaid. If one refuses to be shamed for something one had no part in, then one is shameless, which is even worse.[251]

The Holocaust card is an insult, not just to the world, but to the integrity of the citizens of Israel. Why then is it played so often? Because it continues to work -- at least in the United States, which is especially ironic considering that it was that same United States that was a driving force in bringing Nazi Germany to its knees.[252] As long as this principle of guiltless guilt continues to work on the United States, however, Mr. Begin is assured the money and munitions that allow freedom of action and freedom from responsibility. Why should Israel care as to the thinness of its "defensive" claim concerning Osirak or as to the unanimous condemnation by the Security Council that ensued,[253] so long as the Holocaust card works again on the United States and it renews the shipment of F16's and continues the FY82 commitment of 2.2 billion dollars in aid to Israel?[254]

If the United States cannot see the respondent superior analogy because it is surely not the master of Israel, then perhaps one might suggest to the United States a more apposite analogy, like the Dram Shop legislation of its sev[illegible]tates. When the bartender negligently supplies the customer too much, so that the customer loses control, then the bartender must bear the responsibility for the damage that is done.

Conclusions and Recommendations

Although Israel and the Soviet Union are at opposite ends of the ideological spectrum, the application of a non-ideological,

multi-factor analytical methodology to the evaluation of their actions in Iraq and Afghanistan leads to a similar decision-making conclusion: their actions cannot be justified under international standards of anticipatory self-defense, for neither instance evidences either adequate necessity or proportionality of response.

In spite of their disparate ideologies, both claimants share similar perceptions of their uniqueness and the uniqueness of their security needs. Both the Bridgehead and the Begin Doctrines require preventive action, both coercive and invasive, whenever even the potential of possibly threatening activity is present.[255] Both nations have acquired occupied territories for further insulation, only to perceive each expansion as precipitating a need for even more "defense." Each step taken to satisfy the demands of security only increases their sense of insecurity. Both perceive themselves to be encircled and alone, forced by external hostility to extraordinary measures of self-defense, and even though the foreign territories that they occupy do not alleviate insecurity, neither is able to trust any good offices which might suggest that surrender of those territories might lead to greater security for all. Both perceive unilateral force to be an indication of continued strength.

Both nations also reject the reciprocity that is implicit in recognition, as each demands that its sovereignty be respected

and recognized, but each reserves the right, due to its unique security needs, to interfere with or deny the sovereignty of others. Sovereignty shields Dimona from any international initiatives, but sovereignty has no applicability to Osirak. Sovereignty now demands the recognition of Karmal in Afghanistan, but sovereingty was not an issue in the initial invasion and overthrow of Amin.

Whether it is the claim to be the vanguard and protector of the chosen socialist path, or the claim to be the undoer of the Diaspora and the defender of The chosen Jewish People, each such claim is demanding of the international community something it cannot afford to give -- an international affirmative-action program for one nation's benefit.[256] International law cannot place an imprimatur of preference on the Soviet ideology of socialism, any more than it can allow Israel an exemption from the law of nations due to the Holocaust and the "injustice" which once befell the borders of King David. Once international law fosters preference, it forfeits universality, and the latter is the linchpin of any legal system. Without it, the force of law is lost to the demands of the law of force.

Even though the United Nations has seemingly lost the decisional will to exercise the enforcement sanctions available to it (due to Permanent-Member vetos and the unwillingness of states to suffer the domestic economic strains that trade sanctions impose on the sanctioner), it is a positive sign that that forum has

proven able, in its decision-making capacity, to functionally, vice ideologically, analayze actions of its member states, and to strongly condemn those actions when they run contrary to the basic purposes and principles of the Charter.

The presence of foreign troops in Afghanistan has twice been condemned by the General Assembly, and further resolutions of condemnation should continue, both as a reaffirmation of the illegality of the act and as a sanction which carries with it increasing political cost to the Soviets and thus increasing incentive for the Soviets to seek an internationally acceptable solution.

Israel has also righfully received the unanimous condemnation of the Security Council, and the General Assembly should take immediate steps to reinforce this Security Council action with its own resolutions of condemnation, when it reconvenes in September.

The United States, however, is the only nation which can effectively influence the attitude and actions of Israel, and it is in America's self-interest to do so. Israel's present posture compromises United States' interests in at least four long reaching ways: (1) economically, with the wedge that it drives between the mutual trade interests of the Arab states and the West, (2) strategically, with the loss of critical influence in the Levant and the Persian Gulf,[257] (3) morally, with the loss of image as a force of peace and justice (an image that Americans truly cherish),

and (4) legally, as it establishes precedents that the United States cannot condone now but attempt to condemn later when others act in kind.[258]

Some circles might argue that America is economically strong enough to survive without the Middle East, strategically secure enough to forego that region's support, and that morality calls for recollection of the Holocaust, not reflection of current denials of the right to self-determination. However myopic these arguments might be, their acceptance would not dispel the pivotal implications of the fourth factor, legal precedent. The United States cannot continue to provide "blank check" support to the claimant without binding itself to the claim.[259] Even United States domestic legislation requires that the support to Israel be only for "defensive" purposes, and by its conduct (which speaks to the world much louder than its careful condemnation of the Osirak raid)[260] of continuing that support after each Israeli "defensive" claim, it is unmistakably evidencing a concurrence, or at least a tolerance,[261] of that claim. Other states will take notice, and when they too take recourse to similar exercises of "supreme, legitimate self-defense," the hands of the United States will be tied by the precedent of Palestine and the example set at Osirak.

FOOTNOTES

1. Cong. Research Service, Report for the House Committee on Foreign Affairs: Soviet Policy and United States Response in the Third World, 97th Cong., 1st Sess. (Comm. Print 1981), at 86-87 (hereinafter cited as "CRS Report").

2. Wash. Post, June 10, 1981, A1.

3. See Blum, "The Beirut Raid and the International Double Standard," 64 A.J.I.L. 73 (1970) (noting, at 105:

> An international lawyer dedicated to the principle that the rule of law ought to prevail in international relations cannot lose sight of the fact that the application of different sets of rules to similar situations--and this, unfortunately, is the current international practice--is a negation of the idea of equality before the law. And there can be no rule of law without equality before the law.).

4. U.N. Charter art. 51.

5. See generally M. McDougal & F. Feliciano, Law and Minimum World Public Order ch. 3 (1961), and authorities cited therein.

6. I Oppenheim-Lauterpacht, International Law 299 (8th ed. 1955); II Oppenheim-Lauterpacht, International Law 159, 188 (7th ed. 1952); Blum, supra note 3, at 102 ("The principle of nemo debet esse

judex in propria sua causa . . .is an elementary canon of natural justice and also of international law. . . ."); McDougal & Feliciano, supra note 5, at 219 ("The statement that the acting state 'alone is competent to decide whether the circumstances require recourse to war in self defense' cannot be taken literally without in effect repudiating fundamental community policy.") (footnote deleted). For additional discussion concerning the illusory nature of any commitment which is dependent upon a self-determination of its applicability, see W. Bishop, International Law 70-74 (1962) (discussing the United States' "Connally Reservation" to the Optional Clause on jurisdiction of the International Court of Justice).

7. McDougal & Feliciano, supra note 5, at 229-32.

8. Letter from Daniel Webster to Mr. Fox, Apr. 24, 1841. British Parliamentary Papers, vol. 61 (1843); British & Foreign State Papers, vol. 29, at 1129.

9. I Oppenheim-Lauterpacht, supra note 6, at 300-01; Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law," 31 Geo. Wash. L. Rev. 335, at 347-48 (Dec. 1962).

10. See, e.g., Mallison, supra note 9, at 348.

11. See, e.g., II Oppenheim-Lauterpacht, supra note 6, at 190 (noting that, even though the International Military Tribunal at Nuremberg adopted the Webster formula with regard to preventative action taken in foreign territory, the "development of new instrumentalities of war--such as those inherent in atomic warfare--may render existing definitions of aggression inadequate.").

12. See Mallison, supra note 9, at 348.

13. See, e.g., Bender, "Self-Defense and Cambodia: A Critical Appraisal," reprinted in Vietnam War and International Law (R. Falk ed.), vol. 3, 138, at 143 (1972) ("To the extent that an anticipatory attack will involve a breach of another state's right of territorial integrity, as opposed to an exercise of force which, for example, takes place on the high seas, the standards imposed on evaluating the necessity of the actions should be stringently applied.").

14. See, e.g., McDougal & Feliciano, supra note 5, at 241-43.

15. Id. (and authorities cited therein).

16. Id. at 218, 243.

17. VII Doc. German Foreign Pol'y 491 (1939); W. Shirer, Rise and Fall of the Third Reich 791-94 (1960).

18. See, e.g., Singh, "Right of Self-Defense in Relation to the Use of Nuclear Weapons," 5 Indian Y. B. Int'l Aff. 3 (1956). But cf. McDougal & Feliciano, supra note 5, at 244 (stating that the nuclear/conventional dichotomy is but one important index within the full context of the conditions at hand and making reference to the different gradients of intensity within modern-day nuclear arsenals, e.g., theater nuclear weapons versus strategic nuclear weapons). Certainly the use of tactical nuclear weapons is preferrable to strategic nuclear weapons, in a conservation-of-values sense, but the uncertainties of escalation make such distinctions appear, unfortunately, more aspirational than probable.

19. I Oppenheim-Lauterpacht, supra note 6, at 303; Mallison, supra note 9, at 349.

20. I Oppenheim-Lauterpacht, supra note 6, at 303.

21. Id.; Mallison, supra note 9, at 349.

22. I Oppenheim-Lauterpacht, supra note 6, at 303; Mallison, supra note 9, at 349. It might be noted that in a different era, 140 years before Oran, Britain made a similar claim of self-defense to justify Lord Nelson's bombarding of the Danish fleet in Copenhagen harbor in the spring of 1801. Denmark, at the instigation of Napoleon, had joined with Russia, Sweden, and Prussia in an Armed

Neutrality of the North, effectively sealing off the Baltic from British access. Whether such action constituted a sufficient threat to Great Britain as to necessitate the coercive measures taken is at least questionable, for the British were faced not with an immediate question of survival, but more with a question of logistics, for the Baltic countries had been the main source of masts, spars and other naval stores for the Royal Navy (and Britain, using its seapower to wage economic war on France, also wished to continue the interdiction of such supplies to the French Navy). At some point the shortage of stores to the Royal Navy may have become critical, if combined with an imminent threat by Napoleon to break the Channel blockade, but the element of immediacy was certainly less pressing than at Oran in 1940. See E. Potter, Seapower 142-47 (1960). Six years after Lord Nelson's questionable mission, the British returned to bombard the Danish fleet once again, but on that occasion the circumstances were more similar to Oran, as all evidence available pointed to an intent on the part of Napoleon to seize the Danish Navy. I Oppenheim-Lauterpacht, supra note 6, at 299-300; G. Smith, History of England 539-40 (1966).

23. McDougal & Feliciano, supra note 5, at 211-12; Bender, supra note 13, at 140-41.

24. See note 23, supra.

25. R. Ergang, Europe since Waterloo 592 (1961).

26. U.N. Charter art. 51.

27. For a recent and thorough presentation of the restrictive view, see Badr, "Exculpatory Effect of Self-Defense in State Responsibility," Ga. J. Int'l & Com. L. 1 (Winter 1980) (with extensive citation to other authorities); see also I. Brownlie, International Law and the Use of Force by States 275-76 (1963); P. Jessup, A Modern Law of Nations 166 (1948); II Oppenheim-Lauterpacht, supra note 6, at 154, 156.

28. One possible argument in favor of the restrictive interpretation stems from the general disfavor of historical customary law principles by Third World Nations, as those nations had little say in their development and were frequently the object of their abuse.

29. See Badr, supra note 27, at 22 (wherein he somewhat unwieldily states: "Some meta-juridical arguments based on pseudo-strategic considerations have been advanced in support of the permissability of anticipatory self-defense. . . .(but) a complaint to the Security Council under Chapter VII of the Charter should be sufficient to deter any armed attack under preparation"). But cf. II Oppenheim-Lauterpacht, supra note 6, at 174 (noting that because

> decisions under Chapter VII of the Charter require the concurring vote of all the permanent members of

> the Security Council even if one or more of them is a party to the dispute, no coercion against a permanent member of the Security Council is legally possible and . . .therefore the machinery for the enforcement of peace must break down at the only point at which it is essential for the peace of the world.).

30. See, e.g., Badr, supra note 27, at 21 (while admitting that "the sooner the action in self-defense is taken, the more likely it is to be successful," Mr. Badr continues to assert a requirement of priority, for "(i)f the sequence in time between the two acts (attack and defensive action) is disregarded, the line of demarcation between aggression and self-defense would be blurred beyond recognition."

31. For a presentation in favor of the expansive interpretation of Article 51, with citations to proponents of both the expansive and restrictive views, see McDougal & Feliciano, supra note 5, at 232-41.

32. Id. at 237.

33. As Article 2(4) of the Charter requires states to refrain not only from the use of force, but also the threat of such use, against the territorial integrity or political independence of other states in any matter inconsistent with the Charter, it is reasonable to assume that self-defense may be exercised not only against armed force, but also against an immediate and endangering

threat of such use. Subsequent interpretive U.N. resolutions have also stressed that the threat of such a use of force itself is a violation of international law. See, e.g., U.N.G.A. Resolution 2625(XXV), "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970) (adopted by consensus). Further, the "Definition of Aggression," also adopted by General Assembly consensus, takes a broader approach to aggression than just an "armed attack." U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. 19, U.N. Doc. A/9619 (1974). It might also be noted that the equally official French text of Article 51 of the Charter employs not the phrase "attaque armee," but the apparently broader expression "aggression armee." See Mallison, supra note 9, at 361.

33a. R. Langer, Seizure of Territory, ch. XXIII (1947).

34. See Verosta, "Krieg u. Angriffskrieg" Österreichische Zeitshrift für Öffentliches Recht und Völkerrecht, vol. 31, no. 3-4, 242 (1980).

35. McDougal & Feliciano, supra note 5, at 219.

36. See, e.g., R. Taoka, Right of Self-Defense in International Law (1978); Singh, supra note 18.

37. Cf. Badr, supra note 27, at 21 (concerning the requirement of priority).

38. See Fonteyne, 4 Cal. W. Int'l L. J. 203, at 269 (1974) (wherein he comments that it is a "mistake, in general, to stop short of recognition of an inherently just principle, because of the possibility of non-genuine invocation").

39. U.N. Charter art. 2(4).

40. For a thorough discussion of this aspect of the Cuban Missile Crisis, see Mallison, supra note 9.

41. The official justification ultimately utilized by the State Department was based on the regional enforcement provisions of the Rio Treaty and resolutions of the Consultative Organ of the Organization of American States. See (then State Department Legal Advisor) Chayes, "The Legal Case for U.S. Action on Cuba," 47 Dep't State Bull. 763 (Nov. 19, 1962); Stevenson (also a former State Dep't Legal Advisor), "United States Military Action in Cambodia: Questions of International Law," reprinted in Vietnam War and International Law (R. Falk ed.), Vol. 3, at 24 (1972).

42. As to the interpretive power of the political organs of the United Nations and the import of subsequent practice of states, see R. Higgins, Development of International Law through the Political Organs of the United Nations 1-10 (1963).

43. 389 U.S. 347 (1967).

44. For further discussion of, and legal support for, the actions of the United States during the 1962 missile crisis, see Meeker, "Defensive Quarantine and the Law," 57 A.J.I.L. 515 (1963); Christol & Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," 57 A.J.I.L. 525 (1963); MacChesney, "Some Comments on the 'Quarantine' of Cuba," 57 A.J.I.L. 592 (1963): McDougal, "The Soviet-Cuban Quarantine and Self-Defense," 57 A.J.I.L. 597 (1963); Mallison, supra note 9. But cf. Wright, "The Cuban Quarantine," 57 A.J.I.L. 546 (1963).

45. Compare Mallison, supra note 9, at 348 with Badr, supra note 27, at 23.

46. As former Chairman of the Joint Chiefs of Staff, Maxwell Taylor, has stated concerning the nuclear option: "We are not dealing with war in any rational, Clausewitzian sense--the use of military force as another means for a government to achieve political ends beneficial to the nation. In any major strategic (nuclear) exchange, the reciprocal damage would create conditions that would make victory and defeat virtually indistinguishable. . . ." Wash. Post, June 30, 1981, A17.

47. As James L. Buckley, Undersecretary of State for Security Assistance, has cryptically commented: "The option of nuking the nukes is simply not acceptable." Wash. Post, June 25, 1981, A2.

48. Adopted November 24, 1961, by a vote of 55 to 20 (United States), with 26 abstentions; see 16 U.N. GAOR 807 (1961), reprinted in Bishop, supra note 6, at 979-80.

49. McDougal & Feliciano, supra note 5, at 220. For one criticism of Professor McDougal's multi-purpose approach to legal analysis and decision-making, see Anderson, "A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes," 57 A.J.I.L. 378 (1963).

50. McDougal & Feliciano, supra note 5, at 220-22.

51. Id. at 222-28.

52. Id. at 222.

53. Contrary to contentions of self-defense which claim the need for extended "therapeutic occupation" to accomplish exclusive security objectives (e.g., to date 14 years for Israel on the West Bank or 19 months for the USSR in Afghanistan), McDougal and Feliciano accent that the Charter's conception of self-defense is "an interim and emergency authorization. . . ." Id. at 224.

54. Concerning the importance of inclusivity, the Preamble of the U.N. Charter makes specific reference to the principle that "armed force shall not be used, save in the common interest." See Christol & Davis, supra note 44, at 533:

> Since individual claims and assertions of applicability of the doctrine of self-defense may in fact be unreasonable, the Charter of the United Nations, including Article 51, has placed emphasis on the desirability of using this principle in an orderly and collective way. This is based on the general premise that collective action is less likely to be based on improper motivation and is less likely to result in abuses of the doctrine than in the case of individual action.

See also I Oppenheim-Lauterpacht, supra note 6, at 320. But cf. McDougal & Feliciano, supra note 5, at 253 (wherein they state, in unfortunately general terms, that:

> in assessing the conditions under which collective self-defense is asserted, it may be appropriate to require a higher degree of imminence of attack and more exacting evidence of compelling necessity for coercive response by the group as such than would be reasonably demanded if the responding participant were a single state.

55. Mallison, supra note 9, at 378-80, 392.

56. McDougal & Feliciano, supra note 5, at 228-229.

57. Id. at 228.

58. Professor Mallison, in a presentation before the Naval War College at Newport, R.I. ("An Introduction to the Role of Law in the World Community," reprinted in 61 U.S. Nav. War C. Int'l L. Stud. (Vol. 1 of Readings, 1980) 11, at 18) spoke of

> a continuum between diplomatic or peaceful procedures (persuasion) at one extreme, going through various middle grounds to heavy reliance on the military instrument (coercion) at the other extreme. In this conception of a continuum,

> using all instruments of national policy with varying intensities, we may regard war as a situation where there is heavy emphasis on the military instrument, and peace as one where there is relatively heavy emphasis on the diplomatic instrument.

59. Concerning the requirement of exhausting peaceful remedies, see U.N. Charter art. 2(3).

60. See McDougal & Feliciano, supra note 5, at 243.

61. Id. at 229-241.

62. Id. at 241-244.

63. The effectiveness of any interpretative framework is conditioned upon the academic honesty and objectivity of the interpreter. The inadequacies of a plain-meaning-rule approach are not lessened by the adoption of a purpose-oriented analysis, if the interpreter then succumbs to what might be called the plain-purpose-rule approach, selectively promoting one underlying purpose of a norm to the exclusion of considering and balancing other purposes and interests which might be involved. The redeeming quality of any valid analysis is in its open consideration of all relevant factors, for that openness promotes self-criticism and thoroughness, in the knowledge that one's results can thus be cross-checked and reanalyzed by one's contemporary peers and future decision-makers.

64. See N.Y. Times, Oct. 24, 1962, A20.

65. See Wash. Post, June 12, 1981, A1; N.Y. Times, June 25, 1981, A18.

66. All of the factors itemized are discussed in depth in Mallison, supra note 9.

67. Foreign Broadcast Information Service (FBIS), Soviet Union, Dec. 26, 1979, D1.

68. CRS Report, supra note 1, at 86.

69. Id.

70. FBIS, Soviet Union, Dec. 28, 1979, D3.

71. CRS Report, supra note 1, at 86.

72. Id. at 87-88.

73. Id. at 88.

74. See, e.g., Wash. Post, July 5, 1981, A20 ("approximately 85,000").

75. See Langer, supra note 33, at 258; II Oppenheim-Lauterpacht, supra note 6, at 186.

76. M. Wren, The Course of Russian History 737 (1963). In the Security Council meeting of November 2, 1956, the Soviet Union

stated that its troops had entered Hungary "at the request of the Hungarian Peoples Government." 11 U.N. SCOR 24 (1956).

77. Hammond Almanac 558-59 (1981); see also Miller, "Collective Intervention and the Law of the Charter", reprinted in 62 U.S. Nav. War C. Int'l L. Stud. (Vol. 2 of Readings, 1980) 77, at 97-99.

78. The general discussion which follows is a distillation of fundamental Soviet principles. For more exhaustive analyses on the concepts in question, see H. Baade, Soviet Impact on International Law (1965); Z. Brzezinsky, The Soviet Bloc, Unity and Conflict (rev. ed. 1961); B. Ramundo, Peaceful Coexistence: International Law in the Building of Communism (1967). For a collection of further viewpoints on the Soviet interpretation and application of international law, see 61 U.S. Nav. War C. Int'l L. Stud. (Vol 1 of Readings, 1980), 62-114, 609-615.

79. In view of this ideological starting point, rules of international law, although theoretically universal, receive disparate application as between East and West, as the East has attained a higher plateau in fulfilling the genuine interests of their peoples, whereas the West continues to exploit its masses and frustrate their efforts towards achieving their socialist birthright. Therefore he who struggles against the West is a freedom fighter and a living proof of the basic premise, whereas he who struggles against the East must by definition be a reactionary or

a bourgeois interventionist, and an enemy of the true interests of the people. B. Ramundo, supra note 78, at 18-22. See also W. Mallison, Jr., "An Introduction to the Role of Law in the World Community," 61 U.S. Nav. War C. Int'l L. Stud. (Vol. 1 of Readings 1980) 76, at 81-82 (wherein the author poses an insightive counterpoint to the socialists' claim of progressiveness, to wit: "One of the recurring characteristics of the workers' and peasants' paradises is that people (often workers and peasants) try to escape").

80. See generally B. Ramundo, supra note 78, chs. 5 & 7; see also Kanet, "Soviet Attitudes Toward Developing Nations Since Stalin," Soviet Union and the Developing Nations (R. Kanet ed.) 27-50 (1974).

81. One might compare this rationale of "illegitimacy" with Israel's claims concerning the West Bank, i.e., that the 1949 Geneva Civilians Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (1956), 6 U.S.T, 3516, T.I.A.S. No. 3365) is not applicable, as it assumes an occupation of the territory of another sovereign, whereas Jordan's previous presence there is alleged to have been illegitimate. See testimony of Professor (now Israeli U.N. Ambassador) Y. A. Blum before the Senate Judiciary Subcommittee on Immigration, Refugees, & International Law on Oct. 17, 1977, reprinted in Report by Senator Abourezk to the Senate Committee on the Judiciary:

Colonization of the West Bank Territories by Israel, 95th Cong., 1st Sess. (Comm. Print 1977), at 5. But see W. Mallison, Jr., comments, Int'l L. Symposium, Army JAG School, Charlottesville (1978), reprinted in Mil. L. Rev. Vol. 82 (Fall 1978) 3 at 24 (rejecting the Israeli arguments concerning the right of defensive conquest).

82. See B. Ramundo, supra note 78, at 96-97.

83. Id. at 103-05.

84. Concerning the rights of the collective self, Czech Party leader Gustav Husak (with C.P.S.U. Head Brezhnev on the dias with him) reasserted at the Czech 16th Party Congress "that the Warsaw Pact would not hesitate to defend its interests" if instability continued in Poland. He further stated: "(P)rotection of the socialist system is. . .the joint concern of the states of the socialist community." (Emphasis added.) Wash. Post, Apr. 7, 1981, A1.

85. Until December of 1979, "fraternal assistance" in the form of Soviet military invasion was generally reserved for the "benefit" of the peoples within the Bloc -- East Berlin (1953), Hungary (1956), Czechoslovakia (1968). The reasons for this extra measure of "assistance" are many, including the Soviet Union's historical sense of insecurity concerning its western flank -- i.e., the buffer or cordon-sanitaire concept -- and a sense of fear for the potential

ramifications that a democratic movement in the satellites might have within the Soviet Union, as the failure of a socialist experiment in the Bloc would call into question the CPSU's leadership role and its supposed identity with the best interests of all the Bloc peoples. Under principles of reception, the political systems in the Bloc countries have been created in the Soviets' scientific image, and a failure in the "child" might therefore foretell a failure in the father. Any such "genetic instability" can therefore not be tolerated. For a Soviet discussion of the evils of polycentrism and pluralism in the current world socialist movement and the importance of adherance by all workers' movements to the primacy of the communist party and the Soviet interpretation of Marxist/Leninist principles, see Leibzon, "The Revolutionary Vanguard of the Working Class," reprinted in Soviet Law and Government, Vol. XIX, No. 1 (Summer 1980), at 36. As an example of what may in the future be deemed by the Soviets as an unacceptable deviation from socialist orthodoxy is the ongoing reform movement in Poland, which Polish party chairman Stanislaw Kania has termed "socialist renewal." Wash. Post, July 19, 1981, A1.

86. Background Notes: USSR, Dep't State Pub. 7842 (rev. Feb. 1978), at 3.

87. Id. at 1.

88. See B. Ramundo, supra note 78, at 78-79.

89. U.S.S.R. Const. art. 72.

90. The reference in the text to "Soviet," vice "socialist," concepts is intentional. Given the polycentric and competitive nature of the current socialist movement in the world, the Soviets' definition of imperialist/colonialist is ofttimes expanded to include those competitors who fail to recognize the world vanguard position of the CPSU. Therefore the Peoples Republic of China, although socialist, is frequently labelled as imperialist and neocolonialist by the USSR. As to a recent expression of the Soviet socialists' perception of the Chinese socialists as "hegemonists" and "agents" of the American imperialists, see N.Y.Times, June 18, 1981, A3.

91. CRS Report, supra note 1, at 85-86.

92. Id. at 85.

93. Id. at 85-86.

94. In the words of the front page headlines of the Kabul New Times (English edition) of January 1, 1980: "Sanguinary Amin band ousted. . .murderer meets his fate."

95. CRS Report, supra note 1, at 86.

96. Id. at 106. On November 20, 1980, the General Assembly voted 111 to 22 to again demand the immediate withdrawal of "foreign

troops" from Afghanistan (with 7 more African nations joining in the majority vote.) Before the vote was taken, the Soviet Ambassador rose to denounce the resolution as an "inadmissible interference" in the affairs of Afghanistan (!). In reply to previous Soviet assertions that the vote would be an 'unfriendly act", U.S. Ambassador McHenry pointed out in his speech to the Assembly: "The real unfriendly act was the invasion of Afghanistan." Id. at 108. See also N.Y. Times, Nov. 21, 1980, A1.

97. Neither superpower seems trustful of independent neutrals, as the position of being neutral does not comport with the superpowers' perception of the East-West orientation of the world political order. Both superpowers, however, will have to at some point realize that nonalignment does not equate to realignment, for the Third World in general trusts neither superpower and perceives the world political plane not as East-West, but as North-South. As to the Reagan administration's difficulties in trying to convince the world of its East-West analysis of all issues, see the reports concerning the allies' rejection of the U.S. version of the so-called Caribbean Basin Plan, which was hoped by the White House to assist in the economic isolation of Cuba and other leftist governments in the West Indies. Wash. Post, July 12, 1981, A24; Wash. Post, June 27, 1981, A11; Wash. Post, June 23, 1981, A9.

98. CRS Report, supra note 1, at 107. The 92 members of the Movement of Nonaligned Nations have also called for withdrawal of "foreign troops" from Afghanistan. Wash. Post, Feb. 14, 1981, A1.

99. CRS Report, supra note 1, at 87.

100. Id. at 88.

101. Concerning the political cornerstone of the Soviets' anxiety --that the Afghani socialist regime might be replaced by a more Western model--reference might once again be made to U.N.G.A. Resolution 2625 (see note 32 supra), which specifically states in article 5 that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." It might also be noted that Afghanistan and the Soviet Union entered into a "Convention for the Definition of Aggression," one of the so-called Litvinov Conventions, in 1933. 136 B.F.S.P. 545; 147 L.N.T.S. 69 (July 3, 1933). Article III of this Convention declared that no act of aggression can be justified on the instability of the "internal conditions" of a signatory state, whether such instability is due to "its political, economic, or social structure; alledged defects in its administration, (or) disturbances due to strikes, revolutions, counter-revolutions or civil war." This underlying political invalidity of the Bridgehead theory compromises not only the Soviets' position

on the Afghanistan question, but also raises questions concerning at least one justification proffered by the United States for its "police action" in the Dominican Republic in 1965. On May 2, 1965, President Johnson, in a radio broadcast to the American public, stated: "The American nations cannot, must not and will not permit the establishment of another Communist government in the Western Hemisphere." Reprinted in Donelan & Grieve, Int'l Disputes: Case Histories 1945-1970, at 256 (1973). Granted that the Dominican Republic incident involved collective action and U.N. participation in the supervision of subsequent elections and had additional bases of justification, but if the core justification was that of the quoted policy position of President Johnson, then it is functionally a Bridgehead contention deserving of no better or no worse legal appraisal than the Bridgehead argument of the Soviets.

102. CRS Report, supra note 1, at 87.

103. Id. (emphasis added).

104. Recent reports do indicate that clandestine supply lines to the Mujahaddin have now been established by the West, but only as a counter to the already established Soviet presence. Chi. Tribune, July 22, 1981, A9.

105. Wash. Post, Aug. 12, 1980, A1. The Mujahaddin also use the not-so-modern British Lee-Enfield rifle, which makes up for its

age in sharpshooting accuracy. Id.

106. See N.Y. Times, Sept. 11, 1980, A6 (reporting major defections and also noting that Kabul's newspapers were being staffed with Soviet editors); Balt. Sun, Sept. 9, 1980, A2; See also Wash. Post, July 23, 1981, A22 (noting the use in combat of only partially-trained highschool military cadets by the Karmal Regime as a further indication of the drastic depletion of regular Afghani forces); Phil. Inquirer, Sept. 30, 1980, A12 (reporting that the Soviets have had to resort to the hiring of "militiamen" from Afghan tribes at more than 10 times the salary of a regular army soldier). As to the capture of Soviet weapons, cf. reports concerning the war material used by the UNITA forces of Jonas Savimbi in the on-going civil war against the Soviet and Cuban supported government of Angola. Wash. Post, July 20, 1981, A1.

107. Wall St. J., Aug. 29, 1980, A1.

108. Wash. Post, Apr. 2, 1981, A15; See also, Wall St. J., Aug. 29, 1980, A1 (reporting that Karmal himself is protected by Soviet body-guards).

109. Wash. Post, Aug. 12, 1980, A1.

110. This is true certainly as to the claim of anticipatory self-defense under the Bridgehead theory. As to the current supply support of the West to the mujahaddin (see note 104, supra), this external support could rightfully be required to cease simultaneously with the total withdrawal of the Soviet presence.

111. Former West German Chancellor Willy Brandt is reported to have been told by top Kremlin officials that withdrawal from Afghanistan required "assurances of Soviet border security," thus highlighting the exclusivity of the interests being protected. Any settlement acceptable to the Soviets, Brandt was told, would have to bar "all intervention from Iranian and Pakistani territory," which is notable due to the conspicuous lack of any mention of interference from Soviet territory. Wash. Post, July 2, 1981, A28.

112. South Asia analyst Selig Harrison has quoted a Soviet source as confirming that the "Sovietization" of Afghanistan has the objective of molding the latter into another Mongolia -- a previously independent country that is completely under Soviet domination, although it maintains its U.N. status as a voting member/nation. Wash. Post, Feb. 27, 1981, A20.

113. Joining in the second U.N.G.A. resolution calling for "immediate withdrawal of foreign troops" from Afghanistan were Albania, the Peoples' Republic of China, and Yugoslavia. N.Y. Times, Nov. 21, 1980, A1. Romania has also called for withdrawal. Phil. Inquirer, Nov. 6, 1980, A13; Wash. Post, Nov. 27, 1980, A31. Europe's largest nonruling communist party, the Italian Communist Party under Enrico Berlinguer, was even barred from delivering an address to the Soviet Communist Party Congress, due to its criticism of the Soviet presence in Afghanistan. Wash. Post, Feb. 27, 1981, A21.

114. Mallison, supra, note 9, at 357.

115. Concerning the "Great Game" of empire between Russia and Britain in the 1800's over Afghanistan, see Rubinstein, "Soviet Imperialism in Afghanistan," Current Hist. 80 (Oct. 1980); Smith, supra note 22, at 653; Chi. Tribune, Nov. 16, 1980, A3.

116. CRS Report, supra note 1, at 87.

117. Id., at 86

118. An Islamic Conference summit meeting of 38 Moslem leaders has declared its full solidarity with the "holy war" of the Afghani mujahaddin guerrillas. Wash. Post, Feb. 1, 1981, A20.

119. Wash. Post, July 29, 1980, A1; Balt. Sun, Aug. 2, 1980, A1. Even an occasional glimpse of Soviet unwelcomeness is now to be seen within the Karmal government itself. Reports from New Delhi in April, 1981, noted that Karmal's chief economic advisor had resigned to protest the continued Soviet occupation. Wash. Post, Apr. 24, 1981, M11. Khalq leaders have reportedly also demanded the withdrawal of the Soviet troops, and there has recently been a reported "shootout" within the walls of the People's Palace in Kabul between Khalq and Parcham (Karmal's minority party) factions. Wash. Post, June 12, 1981, A24.

120. CRS Report, supra note 1, at 44; Bennigsen, "Soviet Muslims and thw World of Islam," Prob. of Communism (Mar. - Apr. 1980), 38, at 40.

121. It also serves to detract from Soviet confidence, for the Soviet army in Afghanistan, although superior in manpower and firepower, has proven unable to suppress the indigenous forces of the fiercely independent mujahaddin. To quote one guerrilla: "Everything is on the side of the invader -- except the Afghani people." Balt. Sun, July 22, 1980, A2. For an analysis of the first year of the Soviets' occupation, see Khalilzad, "Soviet-Occupied Afghanistan," Problems of Communism (Nov. - Dec. 1980), 23. Morale within the mujahaddin groups is said to be higher now (June 1981) than at any point since the Soviet occupation began. Wash. Post, June 5, 1981, A1.

122. See note 96, supra.

123. See Wash. Post, July 7, 1981, A12 (concerning the two-tiered proposal of the European Common Market, wherein initial negotiations between states other than Afghanistan would lay the groundwork for guarantees of nonintervention by those states in the internal affairs of a neutralized Afghani state, only then to be followed by negotiations between all parties concerned, including the various factions of the Afghani civil conflict, to determine just which government of Afghanistan should be recognized to head that neutralized state); see also Wash. Post, June 25, 1981, A24. U.N. Secretary General Waldheim has also appointed a special representative to achieve a negotiated settlement in Afghanistan, but again progress is blocked by problems of recognition. Wash. Post, Feb. 12, 1981, A29.

124. Wash. Post, July 7, 1981, A12. As to the after-the-fact claim of "internal affairs," one should consider also the presence of the 200,000 Vietnamese troops currently (for the past 2-1/2 years) in Cambodia at the "request" of the Vietnamese-installed regime. In response to the latest U.N. attempt to accomplish a negotiated withdrawal of those foreign troops, Radio Hanoi has chastised the U.N.-sponsored conference as "a gross interference in Cambodia's internal affairs." Wash. Post, July 18, 1981, A22. Vietnam and the Soviet Bloc maintain that the Cambodian situation is "irreversible." N.Y. Times, June 19, 1981, A5.

125. A hijacked Pakistani airliner remained on the ground at Kabul for seven days in March, with accusations of open cooperation by the authorities there with the hijackers. A number of diplomats stated that the Karmal regime (and the Soviets) apparently thought the situation could be manipulated to force Pakistan to recognize it as the lawful government of Afghanistan. Wash. Post, Mar. 17, 1981, A1; Wash. Post, Mar. 16, 1981, A8.

126. CRS Report, supra note 1, at 106-10.

127. Wash. Post, June 10, 1981, A1.

128. Id.

129. See 22 U.S.C. § 2754 (1976). As to the repurcussions of a "substantial violation" of these restrictions, see 22 U.S.C. § 2753 (c) (1976).

130. Wash. Post, June 10, 1981, A1 ("apparently bypassing Jordan"). But cf. Wash. Post, June 12, 1981, A1 (escaped after attack through Jordanian airspace).

131. Christian Sci. Monitor, June 12, 1981, 10.

132. Wash. Post, June 10, 1981, A1.

133. Id.

134. Christian Sci. Monitor, June 9, 1981, 1.

135. See Wash. Post, June 12, 1981, A1.

136. Wash. Post, June 9, 1981, A1.

137. As a minor first example of a startling list of major Israeli information and intelligence "mistakes," it quickly emerged that there had been no such Jordanian announcement. Al-Hamishmar, June 12, 1981, reprinted in Israeli Mirror, June 18, 1981, 3.

138. Wash. Post, June 10, 1981, A1.

139. Wash. Post, June 9, 1981, A1.

140. Christian Sci. Monitor, June 15, 1981, 1; Wash. Post, June 12, 1981, A1.

141. Wash. Post, June 9, 1981, A1.

142. Wash. Post, June 23, 1981, A13.

143. N.Y. Times, June 19, 1981, A11; Christian Sci. Monitor, June 15, 1981, 1; Wash. Post, June 15, 1981, A16.

144. Wash. Post, June 9, 1981, A1.

145. Wash. Post, June 17, 1981, A22.

146. Christian Sci. Monitor, June 9, 1981, 1.

147. N.Y. Times, June 19, 1981, A11; Christian Sci. Monitor, June 9, 1981, 1.

148. Christian Sci. Monitor, June 10, 1981, 13; Wash. Post, June 10, 1981, A1.

149. Wash. Post, June 12, 1981, A1.

150. See B. Martin, testimony before the U.S. Senate Committee on Foreign Relations, June 25, 1981, Hearings on the Aerial Attack of Osirak, prepared comments, 6-7. (The Senate Report of those Hearings is not yet published. Citations to those Hearings will be made to witnesses' prepared comments, if printed and available. The Hearings are hereinafter cited as Senate Hearings on Osirak.); Wash. Post, June 13, 1981, A1.

151. Senate Hearings on Osirak, B. Martin, prepared comments, p.6-7. (June 25, 1981); Christian Sci. Monitor, June 12, 1981, 3.

152. Wash. Post, June 12, 1981, A1.

153. Wash. Post, June 9, 1981, A1.

154. Wash. Post, June 10, 1981, A1.

155. Wash. Post, June 12, 1981, A1.

156. Wash. Post, June 10, 1981, A1.

157. The author is aware of no such invocation.

158. See note 41, supra.

159. Palestine Liberation Organization. See, e.g., U.N.G.A. Res. 3237 (XXIX), "Observer Status for the Palestine Liberation Organization" (1974) (adopted by a vote of 95 to 17 (U.S.), with 19 abstentions); reprinted at 71 Dep't State Bull. 859 (Dec. 16, 1974).

160. South-west African People's Organization. The Republic of South Africa also frequently invokes the right to self-defense in "defending" occupied Namibia, which requires South Africa to strike almost daily into Angola in search for SWAPO contingents. Wash. Post, June 8, 1981, A1; Wash. Post, Mar. 19, 1981, A25.

161. See Wash. Post, Mar. 3, 1981, A10.

162. Iraq is also involved currently in a "second war," given the Kurdish insurgent movement in Northeast Iraq which has escalated since the Islamic revolutionaries took power in Iran. Wash. Post, Feb. 10, 1981, A12.

163. U.N. Doc A/Res/2373 (XXII); reprinted in Bishop, supra note 63, at 289-91.

164. See note 130, supra.

165. Concerning basic principles of vicarious responsibility of states, see I. Oppenheim-Lauterpacht, supra note 6, at 321-69. U.S. Representative Paul Findley (R-Ill.) has spoken to the issue of U.S. responsibility for Israel's actions. Besides recommending that Mr. Begin's expansive concept of "defense" under U.S. arms legislation could easily be truncated by imposing new restrictions as to the use of U.S. weapons beyond the recipient's borders (which would drain much of the interpretive flexibility out of current arms-export legislation, but which leads to the underlying question of just where Israel's "borders" are), the Republican Congressman points out that President Carter's threat in 1979 to reduce aid to Israel if attacks against Lebanon continued brought those attacks to an end for a full year. Wash. Post, July 19, 1981, C6. This tends to confirm that Israel's courage is directly proportional not to "necessity" but to U.S. indulgence and support. Its concept of "necessity" seems to expand to ensure full utilization of whatever support is provided.

166. Israel's definition of "self-defense" continues to expand, as the July 17, 1981, Israeli aerial attack on Beirut, which entailed substantial loss of civilian lives, has also been defended by Israeli Ambassador to the U.N., Yehuda Blum, as an act of "self-defense." Wash. Post, July 18, 1981, A14.

167. The example of the 1968 raid, wherein an Israeli commando destroyed a number of unoccupied Arab commercial airplanes, is presented here only as an Israeli precedent; no judgment is made here as to the legality of the raid itself under international law. Compare Falk, "The Beirut Raid and the International Law of Retaliation," 63 A.J.I.L. 415 (1969) (finding the raid illegal), with Blum, supra note 3 (finding the raid legal).

168. See Blum, supra note 3, at 76-79. A more recent example of Israeli theories of respondent superior is reflected in the July 17, 1981, aerial bombing of densely populated neighborhoods in Beirut. It is one thing to attempt to "pressure" a foreign government by sabotaging an empty civilian airplane; it is another to massacre innocent human beings. Maj. Gen. Yehoshua Saguy, head of Israeli Army Intelligence, has specifically stated that the 1981 Beirut raid "was to attempt to generate Lebanese civilian resentment against the presence of Palestinian guerrillas there." Wash. Post, July 20, 1981, A1. Not only does this statement ignore history, which has shown such irresponsible acts to increase, not decrease, resistance against the perpetrator, but it also completely ignores article 33 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949 (1956), 6 U.S.T. 3516, T.I.A.S. 3365), which specifically states: "Collective penalties and likewise all measure of intimidation or of terrorism are prohibited." Protection of innocent civilians

is not based on reciprocity, but the international mutuality of respect for human decency, and thus for Israel to justify its illegal governmental actions on the basis of sporadic terrorist activity is for Israel to forfeit its claim as a government and to embrace the status of being nothing but a terrorist itself. Mr. Begin, who is also Israel's Defense Minister, has also stated that if the lives of Lebanese civilians are endangered by Israeli attacks the responsibility rests with the PLO. Wash. Post, July 18, 1981, A1. This can only indicate once again that under Israeli international law, the taking of innocent foreign lives is considered a justified method of exerting "pressure" on guerrilla activities. Israel's employment of principles of respondent superior against Lebanon is tragic, since Lebanon is virtually helpless to take effective action, especially while the complainant Israel is perpetuating that helplessness by its continued support of the destablizing forces of Maj. Haddad and factions of the militant Phalangists, and by its continued bombing of Lebanese roads, bridges, and other lines of economy and communication. Concerning the defenselessness of Lebanon, see Wash. Post, July 22, 1981, A23.

169. It might be noted that Col. Muammar Qaddafi of Libya has justified his country's intervention in neighboring Chad in the following words: "When we fight alongside the people of Chad, we are in fact fighting in self-defense, because if France had won, then the Americans, the Israelis and Egyptian President Anwar Sadat would have also won." Wash. Post, Mar. 6, 1981, A19 (emphasis added). The point here is not to defend the use of 35,000 Soviet-equipped Libyan troops and Soviet-built jet bombers to annex part of Chad and intervene in the

internal affairs of the remainder thereof; it is simply to note the inconsistency of the U.S. government's indignation as to such "surrogate" adventurism under a guise of self-defense, when the U.S. is simultaneously supporting Israel in its 14-year occupation of foreign territory and its innumerable bombing sorties outside its borders, all under a similar interpretation of "self-defense." If the United States allows Israel's actions to continue, then the precedents of both superpowers and their "surrogates" will soon eliminate aggression from the international scene, not in the sense that aggression will factually cease, but in the sense that all denotative value of the word aggession will be subsumed in a new international formulation of "self-defense." The end result will be the return of the Law of Conquest to international law.

170. Wash. Post, June 9, 1981, A1.

171. Christian Sci. Monitor, June 16, 1981, 6.

172. Concerning Israel's routine violations of Saudi airspace, particularly in the area of the Saudi's military base at Tobuk, see Wash. Post, July 24, 1981, A13. Concerning the standard of necessity required for a "defending" state to violate neutral territory, see Bender, supra note 13, at 143 ("If the territory involved is that of a neutral, the community interest in restricting the area of hositilies would seem to suggest that an even more demanding standard be required.").

173. CRS Report, supra note 1, at 212.

174. See note 156 supra (emphasis added).

175. As noted by Mr. Carl Degler, Professor of American History at Stanford University, the discussions in the White House in the fall of 1962 did include a suggestion that the United States should launch a preemptive "surgical strike" on the Cuban missile sites. The idea was rejected from the outset, however, as Attorney General Kennedy argued convincingly against it, pointing out that it would be doing to Cuba what the Japanese had done to the United States at Pearl Harbor. A far more apposite historical analogy to Osirak Professor Degler continues,

> is to be found in the refusal of an earlier Republican President to support or accept an Israeli pre-emptive strike in 1956 against an Arab state. The object of that strike, of couse, was Egypt -- today the only Arab country with which Isael has diplomatic relations. Yet in 1956 as today, the argument was that the only way to meet a perceived threat from an Arab state was to strike first.

N.Y. Times, June 25, 1981, A18.

176. Concerning the requisite standards for a legal exercise of anticipatory self-defense, Professor W.T. Mallison testified before the Senate Foreign Relations Subcommittee as follows: "Anticipatory self-defense is regarded as a highly unusual and exceptional matter which may only be employed when the evidence of a threat is compelling and the necessity to act urgent." Senate Hearings on Osirak, W.T. Mallison, prepared comments, 1 (June 25, 1981).

177. Wash. Post, June 12, 1981, A1.

178. Mitterand had vigorously protested the contract with Iraq when he was in the opposition and it was anticipated that his first trip outside France as President would be to Israel. Wash. Post, June 18, 1981, A1.

179. See note 161, supra.

180. U.S. Ambassador to the U.N., Jeane Kirkpatrick, has specifically stated that "diplomatic means available to Israel had not been exhausted." Wash. Post, June 20, 1981, A1. Undersecretary of State Walter Stoessel, Jr., also testified before the Senate Foreign Relations Committee that Israel had not exhausted diplomatic options. Wash. Post, June 19, 1981, A17.

181. The term "blank check" has been specifically used to refer to U.S.-Israeli relations by former Undersecretary of State George W. Ball. Wash. Post, June 15, 1981, A11.

182. Israel has flatly stated that it has no intention of accepting a U.N. Security Council call to allow international inspection of Israeli nuclear installations. Wash. Post, June 21, 1981, A26.

183. See note 6, supra.

184. Concerning Israel's lack of trust in anyone or anything, see Christian Sci. Monitor, June 11, 1981, 1.

185. And its Maecenas, the United States' public.

186. As to proportionality in the most recent "defensive" mores of Israel into Lebanon (July 1981), including the aerial bombings of the densely populated Fakehani section of Beirut, casualties have been estimated at 250 deaths and 900 injuries of Lebanese and Palestinians, in comparison to 4 Israeli deaths and 50 injuries -- a variance in excess of 20 to 1 (in excess of 60 to 1 if just deaths are considered). Wash. Post, July 20, 1981, A1. Again one can only assume that proportionality, in the eyes of the Israelis, factors in a discrimination multiple to reflect the greater value of an Israeli human being in comparison to somehow lesser human beings. One must further question how this philosophy comports with the "humanitarian" concerns claimed to have been involved in the timing of the bombing of Osirak. In the words of columnist Richard Cohen, to respond to random PLO rocket fire by using "the most complex airplanes known to man to bomb a city neighborhood (in Beirut) is not even in the same ballpark . . . . This is what happens when a sovereign state adopts the terrorist morality of its enemies and when its leaders become captive of their own, awful personal experiences." Concerning the responsibility of the United States, Mr. Cohen quite appropriately concludes: "If you don't condone it for your enemies, you can't for your friends, either." Wash. Post, July 19, 1981, B1. William Raspberry also comments: "(Mr. Begin's) guiding principle seems to be two eyes for a tooth . . . . The crucial fact, for U.S. policy, is that Israel's terrorism is U.S.-

supplied and U.S.-financed." Wash. Post, July 22, 1981, A21.

187. Cf. Feldman, "Peacemaking in the Middle East: the Next Step," Foreign Aff., Spring 1981, 756, at 775, (wherein Mr. Feldman recommends as part of the "security package" framework for Israel's withdrawal from the West Bank, that "Israel should develop nuclear weapons in a quantity and of a yield sufficient to demolish salient targets in each of the Arab states (!)).

188. Pakistan may further feel personally prejudiced in its defensive needs by the continued U.S. indulgence of Israel, for the shipment of the F16 fighters that it has requested from the U.S. has now been postponed for "a number of years" because of "commitments to other countries . . . ." Wash. Post, July 18, 1981, A19.

189. As has been noted by President Zia Ul-haq of Pakistan, the Russian invasion of Afghanistan has now made Pakistan "a front-line state." Wash. Post, Mar. 15, 1981, D7. Even if the Soviets were to withdraw from Afghanistan, they have in the interim apparently annexed to themselves the Wakhan Corridor in the northeast section of that state, which establishes a direct border contact between Pakistan and the USSR. Chi. Tribune, Nov. 16, 1980, A3; Phil. Inquirer, Nov. 5, 1980, A9.

190. In the words of Mr. Begin: "We destroyed an atomic bomb-producing plant." Wash. Post, July 14, 1981, A1.

191. Wash. Post, June 17, 1981, A22.

192. Wash. Post, June 13, 1981, A18; Wash. Post, June 14, 1981, A34.

193. Wash. Post, June 17, 1981, A22.

194. Wash. Post, June 10, 1981, A17; Wash. Post, June 15, 1981, A1. The IAEA has said that the January inspection found no evidence of any activities not in accordance with the NPT. Id.

195. See N.Y. Times, June 25, 1981, A1.

196. The Director General of the IAEA has stated that it would have been "practically impossible" for the Osirak reactor to produce weapons-grade plutonium, adding that:

> In such a transparent pool reactor as Osirak, the presence of undeclared fertile fuel elements (the natural uranium blanket) for plutonium production would be easily detected.

Wash. Post, June 17, 1981, A1.

197. Even Israeli scientists have discounted the possibility of undetected diversion of plutonium by Iraq. Christian Sci. Monitor, June 11, 1981, 1. The reactor issue was also examined by a French committee headed by a known friend of Israel, Nobel Prize physicist Alfred Koestler. The committee concluded that the Israeli concern was unfounded. Halaretz, June 12, 1981; reprinted in Israeli Mirror, June 18, 1981, 1. Nuclear specialists note that no signer of the treaty banning the spread of weapons has ever abrogated safeguards. Most of the nations that appear to be developing weapons have refused to sign. N.Y. Times, June 19, 1981, A11. Concerning the improbability

of diversion without detection, see also the statements of Dr. Herbert Kouts, chairman of the department of nuclear energy at Brookhaven National Laboratory in New York, and Dr. Robert Seldon of the Los Alamos Laboratory in New Mexico. Wash. Post, June 20, 1981, A16; and the statement of Charles Van Doren, former assistant director of the U.S. Arms Control and Disarmament Agency, Wash. Post, June 30, 1981, A1 (a study he made of the Iraqi nuclear program "uncovered no evidence of actual Iraqi efforts to develop or manufacture a nuclear explosive device"). The same Washington Post article cites a Congressional Research Study report which concludes that even if Iraq withdrew from the IAEA (since "quick detection" of any clandestine weapons-development project could be expected if IAEA oversight continued) and embarked on a full bomb-oriented program, the amount of weapons-grade plutonium that could likely be produced by the reactor "probably would not soon have been enough . . . for a nuclear weapon." Israel's subjective claim of urgency and clarity of Iraqi intent contrast sharply with such objective evaluations.

198. The IAEA considerd Mr. Richter to have been fired for compromising confidential documents. Wash. Post, July 8, 1981, A18.

199. Senate Hearings on Osirak, oral testimony of Mr. Roger Richter, June 19, 1981.

200. Id., prepared comments of Mr. Richter, at 4-5. Mr. Richter's prepared comments were printed almost en toto in Wash. Post, June 23, 1981, A13.

201. Id., oral testimony of Mr. Richter. Mr. Begin had also made a claim that Soviet technicians were present at Osirak. Christian Sci. Monitor, June 15, 1981, 1. He may again have been "confused" concerning Soviet IAEA inspectors.

202. Id., prepared comments, at 12.

203. Mr. Richter made reference in his prepared comments (at 6-7) and again in his oral testimony to 100 tons of "yellow cake" (U_3O_8) which Iraq possesses and which would not be under IAEA safeguards unless Iraq reported to the IAEA that it intended to convert the yellow cake into a safeguarded category of material. It must be noted, however, that even this purchase of yellow cake from Portugal was properly reported to the IAEA. Far from being "clandestine," Iraq appears to have faithfully reported all of its uranium purchases. N.Y. Times, June 19, 1981, A1. On the other hand, a ship of West German registry carrying 200 tons of uranium ore disappeared from the high seas in 1968, then reappeared several weeks later under a different flag, with a different name and a different crew -- and without the uranium, which American investigators believed had been diverted to Israel. N.Y. Times, June 25, 1981, A1. If such are Israeli methods, it is strange that Israel feels entitled to complain of the "suspicious" nature of Iraqi purchases, which have been conducted openly on the international market and have involved no substantiated violations of either NPT or IAEA standards.

204. Senate Hearings on Osirak, June 19, 1981, prepared comments of Mr. Richter, at 1-2.

205. In a July 11, 1981, editorial of the Jerusalem Post, after commenting that the Osirak raid was at best a short-term solution to the long-term certainty of a Middle East nuclear arms race, the Post commented: "At the last U.N. General Assembly, Israel floated a proposal for a nuclear-free Middle East. When asked about this at his press conference on Tuesday, Mr. Begin dismissed the idea as just 'words, words.' Had he forgotten that it was his own, or at least his government's, idea? Was he suggesting that, with (Osirak) in ruins, he no longer needed it?" Reprinted in Israeli Mirror, June 18, 1981, 1. See also Christian Sci. Monitor, June 12, 1981, 3 ("When asked if he would open up Israeli nuclear facilities to inspection should a zone become feasible, Prime Minister Begin replied "Words, words, words. We want deeds, deeds, deeds.")

206. Concerning the cost-benefit, vice necessity, analysis which may have lead to the Israeli decision to bomb Osirak, see Christian Sci. Monitor, June 9, 1981, 1, wherein it states:

> A few Israeli defense specialists have advocated a nuclear deterrent for Israel. ut others point out the tremendous expense -- perhaps more than keeping up with the current Mideast arms race -- since Israel would have to maintain a second-strike capability.

On might thus attirbute the decision to a permutation of economic determinism rather than to a legitimate concern for any immediate threat to national survival.

207. Senate Hearings on Osirak, June 19, 1981, prepared comments of Mr. Richter, at 15.

208. Senator John Glenn (D-Oh) termed the Osirak raid a "vigilante tactic." N.Y. Times, June 19, 1981, A8.

209. Wash. Post, June 15, 1981, A16.

210. Israel has claimed that its decision to bomb was based on "sources of unquestioned reliability." N.Y. Times, June 19, 1981, A11. It may be more than semantical that the sources were referred to as "unquestioned," rather the "unquestionable."

211. The retraction also appeared in the Washington Post on June 17, 1981, at A22. On the same page, an ad sponsored by the Louis D. Brandeis District of the Zionist Organization of America, after condeming the "whip-wielding media" and "crocodile tears," urged "fair-minded Americans" to let their Congressmen know that "the facts are clear," and then proceeded to repeat the Hussein quote as a fact, even though the Israelis had already retracted the contention at least two days before.

212. A quote by Professor Degler (see note 175, supra), concerning manipulation of the facts surrounding the Cuban Missile Crisis to support the Israeli position, appears equally apposite here: "If such tactics are necessary to defend the Israeli case, then it may indeed be indefensible." N.Y. Times, June 25, 1981, A18.

213. The penchant for the word "lust" is not that of the author, but that of supporters of Israel's position. See, e.g., the "colorful" prepared comments of Representative Tom Lantos (D-Cal.) during the Senate Hearings on Osirak (June 25, 1981) at 1: "When a seller hungry for oil meets a buyer lusting after nuclear weapons, it will take more than a diplomatic chaperone to keep them apart." Also inserted into the record of the Senate hearing was Mr. Lantos' condemnation of the "holier-than-thou pontificating" by the rejectors of the Israeli Osirak claim, for in his opinion:

> Today there is not a Member of Congress who would not support President Reagan were we confronted with hostile nuclear capabilities by Castro's Cuba. The American people would indeed rejoice if the U.S. Air Force in a brilliant, preemptive strike destroyed Cuba's nuclear facilities. We would proudly and rightly call it an essential exercise of legitimate self-defense.

One might add that the presumed "rejoicing" might be of only ephemeral duration, given a 17 minute estimated lag time between the possible retaliatory launching of Soviet land-based missiles and their arrival in the United States.

214. It might be noted that if Western nations are so tainted by subservience to OPEC and the lust for oil, then how does Israel escape from a like "taint," for during the negotiational process of the Camp David accords, Israel's agreement to give up territory that wasn't its to give was in part predicated upon a separate arrangement ensuring Israel of a guaranteed supply of oil from Egypt. Energy availability is a legitimate national consideration of all states; it

implies no taint simply because it forms a pact of the complex fabric of a nation's foreign policy.

215. It might be noted that Israel did not complain of France's corrupted ethics when that same France, in the late 50's and early '60's, provided Israel the technology for the reactor at Dimona. See N.Y. Times, June 25, 1981, A1.

216. A French nuclear attache acknowledged that highly enriched uranium could be used to make nuclear weapons but insisted the French had tight safeguards over its use, had pre-irradiated it in the smaller reactor to make it too dangerous to handle for someone wanting to make a weapon out of it and that the Iraqis had never hinted of such a move. Wash. Post, June 14, 1981, A34.

217. The clause provided that a joint Franco-Iraqi committee would decide on the experimental programs for both French and Italian reactors at Osirak and that French technicians would take part in the experiments. Wash. Post, June 18, 1981, A1.

218. Within hours of Secretary of Defense Weinberger's argument for economic aid sanctions against Israel at a secret June 10 National Security Council meeting called to discuss the Osirak attack, Mr. Begin had been informed and was publically denouncing Secretary Weinberger's position. Wash. Post, June 24, 1981, A21. See also Wash. Post, June 17, 1981, A22; Wash. Post, June 15, 1981, A16; Wash. Post, June 12, 1981, A1.

219. Wash. Post, June 28, 1981, A15.

220. Concerning the dangers involved in U.S. ethnic lobbies placing another nation's interests above those of the United States, see Senator Mathias, "Ethnic Groups and Foreign Policy," Foreign Aff., Spring 1981, 975, at 976 (noting that George Washington "warned against the twin evils of excessive animosity and excessive attachment to particular foreign nations, especially the latter, 'facillitating the illusion of an imaginary common interest, in cases where no real common interest exists. . . .' "). At an ASEAN-hosted dinner at the Conference on Cambodia (July 13, 1981), the Israeli ambassador's invitation was cancelled due to the bombing of the Iraqi reactor, and Secretary of State Haig refused to attend "in the interest of fairness and . . . . the United Nations' principle of universality." Wash. Post, July 14, 1981, A10. How, one might ask, do the bombing of Osirak and the continued operation of Dimona add up to the universality? In any event, the dinner incident again points out the universality of the compromise of U.S. global, vice just mideastern, interests, that continued U.S. support of Israel's expanded sovereignty entails. Mr. Begin's concept of an alliance also includes the caveat that it is "absurd" to think that Israel should consult with the United States before initiating further "defensive" actions which might be prejudicial to U.S. interests. Wash. Post, July 14, 1981, A1. As one Begin aide has stated: "If Israel had to get permission (from the United States), she would never be able to act." Christian Sci. Monitor, June 16, 1981, 6. Besides the fact that this alliance without consultation between allies results in an alliance with only unidirectional benefits, such statements evidence a knowledge on the part of Israel that even its strongest international supporter can find little legal

merit in Israel's perceptions of necessity and proportionality. Given this knowledge, it is small wonder that Israel does not attempt to exhaust its diplomatic remedies, but instead chooses to act first, and only then to engage its extremely vocal lobbying efforts to convince the American public after the fact. If U.S. military and economic aid to Israel continue unabated, she simply has no incentive to subscribe to international law, which requires that the public-relations efforts of peace be made in advance of the "defensive" efforts of coersion.

221. Wash. Post, June 17, 1981, A22.

222. Wash. Post, June 17, 1981, A22.

223. See, e.g., Wash. Post, June 23, 1981, D9.

224. As to the increasingly Nazi methods being adopted or tolerated by the Israeli government during the Israeli political campaign, see N.Y. Times, June 25, 1981, A8 (disruption of Labor Party rallies, with orchestrated jeering and pelting of opposition candidates with eggs; intimidation of opposition voters; smashing of windows of stores which displayed opposition placards; "demonization" of all Palestinians; increased press censorship; enactment of legislation effectively making Palestinian patriotism a crime; utilizing McCarthyism tactics for those perceived to be "soft on Arabs"). Jacobo Timerman, a Jewish publisher tortured and imprisoned by the Argentinian Junta, is now in Israel, and he has stated: "I see very clearly a repition of what happened in Argentina here. . . . There is always a democratic way to elect a fascist government." Id.

225. As to Israeli opposition statements concerning the political motives behind Mr. Begin's order of the destruction of Osirak, see Wash. Post, June 16, 1981, A1; Wash. Post, June 11, 1981, A1. In regailing the opposition concerning their questions as to the domestic political motives behind the bombing, Mr. Begin, like Mark Anthony at the burial of Caesar, reinforced an accusation of treason by denying it emphatically before settling on the world "sabotage." The Israeli Prime Minister stated: "I hate with deadly hatred the word treason. You have never hear this word from my mouth. Anybody can express an opinion, and can err. It's still not treason. Treason, it's a legal term. But there is something of sabotage." N.Y. Times, June 25, 1981, A8.

226. Senate Hearings on Osirak, June 25, 1981, prepared comments of Dr. D. Pipes, passim. One might further note that much of the Senate testimony concerning the alleged instability of Iraq and its President, besides being equally applicable to Israel, is also irrelevant under the Begin Doctrine, which refers to any enemy. The United Sates has recently given its support to an Egyptian reactor project, and although Mr. Begin is now willing to consider Egypt a non-enemy, will that still be the case when and if he returns all of the Sinai to Egypt and thus loses his leverage over that sovereign nation? One might also note that the Islamic heritage that Pakistan shares with the Arab Middle East raises the possibility that Mr. Begin might choose to exercise his Doctrine on Parkistani nuclear facilities, due to the "threat" of an "Islamic bomb." The possibility of this extention of the Begin Doctrine must be particularly disturbing to the United States, as Pakistan is a prominent object of U.S. support in the Asian subcontinent, including ongoing support for its nuclear energy program.

227. In its self-proclaimed role as protector of the rightest Christian Phalangists in the Bekaa Valley of Lenanon, Israeli jets in late April 1981 shot down two helicopters of the Syrian peace-keeping force, which is in Lebanon under Arab League aegis and with the approval of the Lebanese government, whose head of state, President Elias Sarkis, is himself a Maronite Christian. Syria then established SAM anti-aircraft missile sites in the valley to protect against further Israeli incursions. Mr. Begin has regailed against the missiles as a threat which Israel will not tolerate. One may conclude that under Israeli international law (1) Arab forces have no right to protect themselves against Israeli attack, and (2) Israel may intervene when she will to "protect" Christians in a foreign country, but Arabs may never intervene to protect Palestinians in occupied territories. In justification of the Israeli intervention, Mr. Begin has stated: "the 'survival of the Christians of Lebanon' is at stake." Christian Sci. Monitor, June 23, 1981, 13. As noted in the same article:

> Overall, however, Christian leaders in the Middle East are bitterly opposed to Israeli policies - especially policies that concern Jerusalem. Signatories to a resolution declaring Zionism "the new Nazism" were the Greek Orthodox patriarch to Antioch, Alexandria, and Jerusalem; the archbishop of the Syrian Catholic Church; the Syrian Orthodox patriarch; the Armenian Catholic archbishop to Damascus; the Maronite Catholic patriarch to Damascus; and other church officials.

Again, Mr. Begin reserves the right to unilaterally determine not only when the "survival" of Israel is at stake, but also the "survival" of Christian communities outside his borders. Former Defense Minister Ezer Weizman has offered a different justification by simply stating that Israel reserves the right to strike in Lebanon not only in retaliation to Palestinian attacks, but "at any time and at any place that Israel deems desirable." Wash. Post, March 16, 1981, A1. Neither justification has any legal validity under inter-

national law, but at least Mr. Weizman seems to provide a more honest appraisal. The Syrian missile crisis also affords an insight into the inverted concept of "defense" that the Israeli claims require. During a press conference on June 16, 1981, President Reagan made reference to the Syrian SAM anti-aircraft missiles in Lebanon as "offensive weapons." Wash. Post, June 17, 1981, A1. Thus F16's which fly a thousand miles to bomb a nuclear reactor are "defensive", while short range missiles, which chould hit Israeli jets only if they were deep inside Lebanon, are "offensive."

228. See Wash. Post, June 29, 1981, A1. As to Mr. Begin's aggressive posture being his electoral salvation, see also Wash. Post, July 1, 1981, A1.

229. As to the factual blackness, vel non, of Iraq's domestic condition, see the oral testimony of Ambassador James Aikens (former Ambassador to Saudia Arabia) and of Mr. Joseph Malone (President of Middle East Research Assoc., Inc.), Senate Hearings on Osirak, June 25, 1981 (both contesting the position of Dr. Pipes).

230. See note 147, supra. Nazi Germany, it might be noted, invoked humanitarian considerations, with references to "assaults on the life and liberty of minorities," in justification of its 'intervention" in Czechoslovakia in 1939. Proclamation on the German Occupation of Bohemia and Moravia, March 15, 1939, 4 Doc. British Foreign Policy 1919-1939 (3d ser.) No. 259, at 257.

231. Senate Hearings on Osirak, June 19, 1981, oral testimony of Dr. Herbert Kouts and Dr. Robert Seldon. As to an estimate of only a thousand feet, see N.Y. Times, June 25, 1981, A9.

232. The emphasis on the timing of the raid before the reactor went critical is best explained not in humanitarian terms, but as a quiet attempt on the part of the Israelis to ensure at least an apparent distinction between its action and any discussion of a retaliatory attack on Dimona.

233. When asked whether this mistake represented another Israel intelligence failure, Army Intelligence Chief Yehoshua Saguy replied, "perhaps the failure was in France." Wash. Post, June 10, 1981, A1. Again, not satisfied with implying U.S. complicity in the raid, the Israelis were thus attempting to implicate the French.

234. If testimony supportive of the Israeli position before the Senate Hearings on Osirak is any indicator, much of the Israeli "intelligence" pivoted on the presumption of Iraqi clandestine efforts for lack of an explanation as to why an oil producer would want a reactor. Repeated reference was made during the hearings to the absence of any economic need on the part of Iraq for a nuclear energy facility and thus the absence of any acceptable explanation for its construction other than weapons production. This line of argument is disturbing for a number of reasons. (1) Besides ignoring "the inalienable sovereign right of Iraq. . . to establish programs of technological and nuclear development. . . for peaceful purposes in accordance with their present and future needs " (see article 4 of the Security Council's condemnation of the Osirak attack; reprinted in N.Y. Times, June 19, 1981, A10), it approaches the question of Iraqi national values from only a two dimensional direction, assuming that economics could be the only peaceful purpose for reactor construction. Centuries ago, the Middle East was the center of the Western world for science and learning, but now

apparently enlightenment is no longer even considered as a legitimate objective of Arab endeavors (see, e.g., Senate Hearings on Osirak, June 25, 1981, Dr. Pipes, at 4, where he takes as an apparently permanent given the "low state of Iraqi science"). Further, a development program may be ambiguous, but the Soviets can also point to the ambiguous military aspects of U.S. space probes and shuttle flights, but that gives them no right to destroy those scientific experiments based on the ambiguous "threat" that they present. (2) It ignores the presence of very valid economic considerations for an oil producing country to invest in nuclear research, for just as the oil companies have diversified their energy holdings to ensure their continued role in the energy market of the future, the OPEC nations would be economically irresponsible if they did not do likewise. Hydrocarbons will not always be the world's energy staple; the oil-producing countries appreciate this, and it is only good business judgment to invest current petroprofits in alternative-technology research, if they are to avoid becoming "banana republic" export economies in the decades ahead. (3) Even if one facit of Iraqi intent were to be the development of nuclear weapon technology, it ignores the marked distinction between weapons capability and weapons use. Given the nuclear capability that Israel already possesses, it is only reasonable that an "enemy" would want a nuclear counter-option, a second-strike nuclear alternative to deter further Israeli "defensive" expansion. (4) Perhaps most disturbing of all within the context of international law, the argument presumes a unilateral right on the part of Israel to determine the "needs" of Iraq and to destroy whatever Israel determines to be in excess of those "needs." Again it is a situation where Israel's claim to unique security "needs" eclipses all sovereignty rights of other nations. One might add one

further point here: if Israel demands the right to determine the needs of Iraq, why does Mr. Begin consider it "absurd" that the U.S. should have the right to even question the "defensive" needs of Israel?

235. As an apparent example of what Mr. Begin considers exhaustion of diplomatic remedies, the Jerusalem Post has reported that Mr. Begin has told his advisors that he "deliberately overstated the importance of the Syrain missiles (in the Bekaa Valley of Lebanon) to Israel's security to distract attention from preparations for Israel's bombing raid" on Osirak. Wash. Post, June 26, 1981, A22. U.S. Special Envoy Philip Habib's diplomatic efforts were thus exhausted on a diversionary non-issue.

236. See II Oppenheim-Lauterpacht, supra note 6, at 197.

237. U.N. Charter art 2(4). The current Israeli Ambassador to the U.N., Yahuda Blum, has previously noted that in light of article 2(4), the prevailing view holds that a claim of one state that it is in a "state of war" with another state is incompatible with the Charter. See Blum, supra note 3, at 77.

238. The Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 (1956), 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 (1956), 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 (1956), 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (1956), 6 U.S.T. 3516, T.I.A.S. No. 3365), in their common article 2, also make no distinction in the international

context between war or "any other armed conflict."

239. See, e.g., U.N.G.A. Res. 3236 (XXIX), "Question of Palestine" (1974) (adopted by a vote of 89 to 8 (U.S.), with 37 absentions); reprinted at 71 Dep't State Bull. 859 (Dec. 16, 1974). The issue that will not go away--the right of Palestinian self-determination--is the same issue that former State Department Director of the Office of Near Eastern and African Affairs, Loy Henderson, unsuccessfuly raised in 1947. See For. Rel. of the U.S., Vol. V. (1947), 1152-58, 1280-82. Thirty-four years later, the United States government remains apparently lacking in the decisional will to lay aside domestic political considerations and address the issue squarely. See also Mathias, supra note 220, at 992 (noting that General George Marshall, Secretary of State at the time of Israel's independence, also urged that decisions on Palestine not be based on domestic politics).

240. N. Goldmann, "True Neutrality for Israel," Foreign Pol'y, Winter 1979-80, 133, at 140-141. See Wash. Post, June 27, 1981, A18, which notes that Mr. Begin has remained implacable in his steadfast policies of encouraging Jewish settlements on the Arab West Bank, annexing the eastern sector of Jerusalem and declaring the city the undivided capital of Israel, attacking Palestinian camps in southern Lebanon and in effect taking part of that country as a buffer zone on Israel's northern border; bombing Iraq's nuclear installation and remaining intransigent in his refusal to have any dealings with the PLO.

241. President Hussein continues to reject U.N. Resolution 242, but he has suggested that this is not due to any refusal to permit the existence of Israel, but due to the shortcomings of that Resolution in not directly addressing

and resolving the underlying Palestinian question and the return of "usurped territorities". "Issues and Answers," ABC television network, June 28, 1981.

242. Similar to the Brezhinev quote that the Soviet Union does "not covet the lands or wealth of others" (p. 38 supra), Mr. Begin has stated "I do not accept the term occupation. We don't occupy anything that is foreign to us." Wash. Post "Parade", June 14, 1981, 9. Also concerning autonomy, vice sovereignty, on the West Bank, Begin has stated that a "Palestinian state. . .would be a mortal danger to us. . . .". Id. Given what Israel was "forced" to do based on the "mortal danger" posed by Osirak, this argument would lead to, and some would argue has already lead to, an Israeli justification for attempting to destroy the Palestinian People. Concerning the plight of Palestinian refugees, Mr. Begin blames not Israel but the Arab states, stating that this problem "could have been solved many, many years ago through resettlement (elsewhere)." Id. In short, the dictates of Biblical Lebensraum require that everyone else move to accomodate the sacred rights of Eretz Yisrael. Mr. Begin has stated that the election results are a "mandate for Eretz Yisrael" (the Biblical vision of Israel which includes the West Bank and Gaza). Wash. Post, July 9, 1981, A18. Concerning the Israeli rejection of any possibility of Palestinian sovereignty on the West Bank, see Wash. Post, July 9, 1981, A18. Biblicizing the Palestinian West Bank as "Judea and Samaria" to avoid the issue of sovereignty recalls the Nazi precedent of referring to "Bohemia and Moravia" instead of West Czechoslovakia. As to the world position on the West Bank question, see U.N.S.C. Res. 465 (1980), which deplores Israeli settlement policies and declares them devoid of legal validity. The U.S. voted in favor of the Resolution, and then later maintained that its vote had been due to a mis-

understanding.

243. One might wonder as to the claim that security is the motivating factor behind the Israeli "defensive" actions, as opposed to the desire for a unilateral extension of values, when at the same time, Israel has chosen to move its capital from Tel Aviv to Jerusalem, thus voluntarily increasing its personal insecurity by moving closer to the source of the alleged threat.

244. Major Saad Haddad, a former Lebanese military officer who controls an enclave in Southern Lebanon, is claimed by Israel to be a free agent, even though his militia is armed by Israeli sources, clothed in Israli army fatigues, and has marched in Jerusalem's annual military parade. See, e.g., Wash. Post, Mar. 18, 1981, A1; Wash. Post, Mar. 15, 1981, A1.

245. For an analysis of the Israeli claim to represent The Jewish People worldwide, a concept rejected even by the United States, see 8 Whiteman, Digest of International Law 35 (1967); see also W. T. Mallison, "The Diplomatic Methods to Achieve Minimum Order in the Middle East," Jour. of Int'l L. and Econ. 113, at 118-19 (June 1971).

246. It might be mentioned that the United States, like Iraq, has frequently exercized its "constitutive" prerogative of withholding recognition of governments, whether due to its methods of gaining or retaining power, its questionable stability, its lack of defined territory, its lack of a popular base, or its unwillingness to comply with its international obligations under treaties and customary law. As has been indicated by George Aldrich, Acting Legal Advisor to the U.S. State Department at the time of his testimony:

> Each case of recognition—or nonrecognition—involves its own set of factual and political circumstances and depends, in the final analysis, on the judgment of the executive branch. The decision whether to extend recognition is made after weighing a number of considerations relevant to the basic question of whether recognition or nonrecognition would better serve the foreign policy of the United States.

Hearings on S. Res. 205 (U.S. Recognition of Foreign Governments) before the Senate Comm. on Foreign Relations, 91st Cong., 1st Sess. (1969) at 9. For a general discussion of the U.S. position on recognition, see Barnes, "United States Recognition Policy and Cambodia," reprinted in Vietnam War and Int'l Law (R.A. Falk ed.), Vol. 3, 148 (1972).

247. Even if Iraq were to agree to recognize Israel under the conditions of the 1967 U.N.S.C. Resolution 242 (XXII), which called for the "withdrawal of Israeli armed forces from territories occupied in the recent conflict" and the establishment of "a just and lasting peace" with "secure and recognized boundaries," it is interesting to note that, under the Israeli interpretation of that resolution, it has no obligation to withdraw from the West Bank and can chose to exercise full sovereignty over that area. See Blum, supra note 3, at 94-98 (noting that Resolution 242 did not require withdrawal from all occupied territories); see also the comments of Mr. Blum, the Israeli Embassy in Washington, D.C., and Moshe Dayan, which are reprinted in A Report by Sen. James Abourezk to the Senate Committee on the Judiciary: Colonialization of the West Bank Territories by Israel (Comm. Print), at 5-6 (Dec. 1977) (concerning Israel's claim to better "relative" title to the West Bank and its refusal to consider the creation of a Palestinian State in any form).

248. As noted supra at page 60, Israel has invoked national-security grounds to protect its "sources of unquestioned reliability," thus refusing to provide the world community with a full disclosure of the information upon which its claim to necessity rests. Especially in the Osirak instance, where Israeli intelligence appears to have been so consistently inaccurate, the result of such a posture is circular. The world community is to be the final adjudicator, but the claimant, after stating that national security required the action, maintains further that that same national-security interest prevents the presentation of any evidence upon which the adjudicator might decide. The case thus is imbued with what might be called the Martin Luther defense, as the claimant demands that it be exonerated "on faith alone."

249. In another contrast to the Israeli double standard between Osirak and Dimona, it might be noted that, after the Cuban Missile Crisis was resolved, President Kennedy ordered the removal of medium-range missiles from Italy and Turkey, which had had a land-based strike capability of delivering warheads on Moscow. Christian Sci. Monitor, June 19, 1981, 13.

250. As to the irresponsibility of the Israeli aerial attack and the overall contrast it poses to the U.S. actions during the Cuban Missile Crisis, see the comments of Philip Klutznick, a member of the U.S. delegation to the U.N. in 1962 and a former President of B'nai B'rith International and the World Jewish Congress, Christian Sci. Monitor, June 19, 1981, 23.

251. Mr. Begin's proclivity for playing the holocaust card is ironic also in that the majority of the Jews in Israel are non-European, never having experienced the Nazi reign of terror, and yet it is this electorate base of Sephardic Jewry from which Mr. Begin draws his political support. The substantial majority

of European Jewry, i.e., those who were closest to the autrocities of the holocaust, vote against Mr. Begin and his growing militarism. Wash. Post, June 29, 1981, A1. As to current examples of the holocaust card at work, see, e.g., Wash. Post, June 19, 1981, A20 (concerning the Syrian missile crisis); Wash. Post, June 4, 1981, A21 (decrying the F.R.G.).

252. Senator Mathias has noted that the American Israel Public Affairs Committee distributed copies of the novel Holocaust to every member of Congress. See Mathias, supra note 220, at 994. It might be also noted that while to accuse others of lusting for oil is considered appropriate, to even state publically that a strong Jewish lobby exists in the United States brings immediate response such as "defamatory," "maligned American Jews," and an "insult to the Jewish community and indeed to the American public." Wash. Post, July 12, 1981, A6 (Jewish organizations' response to the statements of Rep. Paul McCloskey (R-Cal.) to the effect that the Jewish community has a tendency to control the actions of Congress). Senator Mathias was also the object of criticism (see Wash. Post, June 28, 1981, B1) for his Foreign Affairs article, wherein he makes the timely observation that "political appeals to separatism and parochialism (by American ethnic groups). . . .belie the cherished philosophy of the 'melting pot' (see Mathias, supra note 220, at 980). Concerning the issue of parochialism, one might think that it would be disturbing to many Americans of Jewish heritage, who have always supported liberal causes like the A.C.L.U. as the best insurance of equal protection for all, that Mr. Begin chose instead to call Mr. Jerry Falwell of the Moral Majority in his efforts to find support for the Osirak raid. Wash. Post, July 12, 1981, A6. In short, to resort to ad hominem arguments, whether accusations of "oil corruption" or "Jewish money,"

serves only to distract attention from the serious, issue-oriented discussions needed to resolve the underlying problems extant in the Middle East. Mr. Begin has been accused of attempting to "demonize" all Palestinians and even Arabs in general, which unfortunately evidences a willingness on his part to adopt the very stereotypic consciousness which served the Nazis so well in their campaign of terror against European Jewry four decades ago.

253. For a reprint of the Security Council Resolution of Condemnation, see N.Y. Times, June 19, 1981, A10. Israeli Ambassador to the U.N., Yahuda Blum, has termed the Security Council's action as a "temporary irritant." Wash. Post, June 20, 1981, A1. One might compare this response with the words of Thomas Jefferson in the Declaration of Independence concerning "a decent respect to the opinion of mankind."

254. Concerning the FY 82 commitment, see Christian Sci. Monitor, June 16, 1981, 6. Since World War II, Israel has been the second highest recipient of U.S. foreign aid. Wash. Post, July 10, 1981, A21. On a per capita basis, it may be presumed to be the number one recipient. In the words of the Christian Science Monitor:

> It must strike the American people as odd that, for all the military and economic aid which the US has given Israel - that aid accounts for almost half of the total US aid budget this year - it has never demanded that Israel sign the nuclear nonproliferation treaty (NPT).

Christian Sci. Monitor, June 22, 1981, 24. And yet, in an almost incredible example of Congressional indulgence of Israeli demands, a majority of both Houses, only 17 days after Israeli fighters violated Saudi air space on their way to Osirak, has petitioned the White House not concerning the withholding

of F16's from Israel, but concerning the withholding of AWAC surveillance planes from Saudi Arabia, on the basis that the Saudis "have displayed a hostility that must be interpreted as their deliberate intention to promote continued instability in the Middle East." N.Y. Times, June 25, 1981, A1. Further, at the same time that Congress was attempting to thwart the AWACS sale to the Saudis, the House Appropriations subcommittee, while cutting virtually all sections of the foreign military sales bill, was adding $50 million to the $500 million "forgiven loan" to Israel for military hardware. Wash. Post, June 25, 1981. A1. It is not difficult to understand, with such examples for the world to see, why America's credibility is so severely questioned around the world.

255. Aside from current international law, even concepts of natural law appear contrary to such an expansive claim. Immanuel Kant, in his treatise on the natural law of states, recognizes a right to defensively attack not only when a state is faced with an "immediate threat of attack" ("unmittelbar bevorstehenden Angriff"), but also a threat occasioned by the "terribly growing power (potentia tremenda) of another state" ("fuerchterlich anwachsende Macht"). But Kant bases this latter natural right on another natural principle, namely the balance of power ("Recht des Gleichgewichts"). It is thus a right of weaker states to exercise against the stronger until an equilibrium is reached, not a right of stronger states to perpetuate their military (or nuclear) superiority. Immanuel Kant, Metaphysische Anfangsgrunde der Rechtslehre, Vol. II (1797), sec. 56. Grotius is even stricter, rejecting out of hand any right to attack based on the growth of another nation's power

which might later become capable of inflicting damage. He states: "Aber dass die Moeglichkeit, Gewalt zu erleiden, schon das Recht, Gewalt zu gebrauchen, gebe, ist ohne allen gerechten Grund" (author's rendering:"But (the proposition) that the possibility that one might suffer from an act of force already gives one the right to commit an act of force is without any legal basis"). H. Grotius, De Jure Belli ac Pacis (translation by J.H. v. Kirchmann), Vol. II (1869), 237.

256. Unilateral extension of values, whether subtitled as Manifest Destiny, Drang nach Osten, Workers Movement of the World, or Revival of Judea and Samaria, all botton on the generic denominator of colonialism. Although Israel and the Soviet Union condemn each other's positions, the functional similarity in their colonial actions bears further mention. For example, (1) both have injected irredentism into their occupation policies, Israel by annexing East Jerusalem and the USSR by apparently annexing the Wakhan Corridor of north-eastern Afghanistan, thereby cutting Afghanistan off from the PRC and establishing a common border between the USSR and Pakistan). Concerning the Wakhan Corridor, see note 189, supra. (2) Both have taken steps to institution-alize the dependence of the occupied territory upon the occupier through electrical power grid realignments. Compare J. Terry, "State Terrorism: A Juridical Examination in Terms of International Law," J. of Palestinian Stud., issue 37 (1980), 94, at 110, with Wash. Post, Feb. 27, 1981, A20. (3) Both continue to frustrate international efforts at negotiated settlements by refusing to allow the respective resistance movements a place at the negotiating table. Concerning the Soviet refusal to allow the Mujahaddin any role in the

negotiating process, see Wash. Post, Feb. 12, 1981, A29. It might be noted further that although the Palestinian and Afghani situations are disparate geographically, they share a common issue of Islamic independence.

257. To the extent that the "Carter Doctrine" concerning protection of the Persian Gulf remains the American economic and strategic policy position of the Reagan Administration, America's continued strong support of Israel in spite of its actions "severly complicates" the viability of its coordinated implementation. See Newsom, "America Engulfed," For. Policy, Summer 1981, 17, at 22. Mr. Newsom, former undersecretary of state for political affairs, also questions the unilateral cornerstone of the Carter Doctrine ("An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force") in comparison with the Eisenhower Doctrine of 1957, which pivoted on foreign nations requesting assistance from the United States. Id. at 17. Even if one overlooks this unilateral aspect of the Carter Doctrine and even if one assumes that the U.S. has the right and the ability to enforce it, it is worth noting that the expansiveness of the Begin Doctrine has the potential to eclipse and defeat the continued-flow-of-oil basis which underlies the Carter Doctrine. Given the fact that the Begin Doctrine applies to "any enemy," and given the Israeli claim that it is the world corruption by Arab oil that isolates Israel and "forces" her to take "defensive" acts, it requires no Kierkegaardian leap of faith to assume that future Israeli attacks will not be directed only at the fruits of petrodollar power (like nuclear reactors), but

also at the source of that power itself—the oil fields.

258. A Congressional Research Service report to Congress concerning the Osirak raid specifically gives warning as to the precedent which will be set for other nations if the U.S. fails to take effective action against Israel. See Wash. Post, June 20, 1981, A17.

259. With the United States' historic willingness to accept Israel's definition of "self-defense", it is small wonder that the People's Republic of China is unconsoled by the assurance that any arms sales to Taiwan will be for "defensive" purposes only. See Wash. Post, June 17, 1981, A1; Wash. Post, June 5, 1981, A1 (concerning White House "determination" to enforce that portion of the Taiwan Relations Act which permits only the sale of "defensive" weapons to Taiwan).

260. A newspaper in Beirut has noted that the United States is giving "words to the Arabs and arms to Israel." Wash. Post, June 18, 1981, A22. This perception of Western legerdemain is not new to the Third World. A tribal chieftan in colonial Africa was once quoted as remarking" "When the white man came, we had the land and he had the Bible; now we have the Bible, and he has the land."

261. Mr. Begin has acknowledged that there has been tension with the United States over the use of U.S.-supplied fighter bombers at Osirak, but he has sought to portray that as a problem for the United States and not for Israel. Wash. Post, July 14, 1981, A1. Such a comment capsulizes the Israeli approach

to its United States "alliance" — a single-entry accounting system which expects constant credits but which accepts no debits. An audit is long overdue.

Author's Note:

Due to conflicting military commitments, the time devoted to research, drafting and editing of this paper was necessarily compressed. Every effort has still been made to achieve a polished final product, but should an occasional "rough edge" appear in the paper, understanding and clemency are requested.

Once the Senate Hearings on Osirak are reduced to a final Senate report, the footnotes of the bound copy of this paper (on file at the National Law Center, George Washington University, Washington, D.C.) will be modified to reflect the complete citational format.

Footnote citations to newspaper material and quotations refer to the page at which the pertinent article begins, not to subsequent pages where it may be continued.

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